Supreme Court U.S.
FILED

No. 98 1381 FEB 26 '99

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERITECH CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (and consolidated cases) (Jan. 25, 1999), this Court vacated the Federal Communications Commission's rule specifying the network elements that must be provided on an unbundled basis to requesting telecommunications carriers, 47 C.F.R. § 51.319 ("Rule 319"). The FCC order at issue here, called the *Third Order*, addressed the definition of "interoffice transmission facilities," one of the network elements that Rule 319 had designated for unbundling. The question presented is:

Whether the *Third Order* should be vacated and remanded for proceedings consistent with the network element remand proceedings from *AT&T Corp.* v. *Iowa Utilities Board*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners here are Ameritech Corporation, Bell Atlantic Corporation, the GTE Entities, U S WEST, Inc., and the United States Telephone Association. The parties to the proceeding in the Eighth Circuit are listed in the captions of the decision below. See App. 1a-10a, *infra*.

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Ameritech Corporation has no parent companies. It has the following non-wholly owned subsidiaries: MATAV, Tele Danmark, and Telecom Corporation of New Zealand. A proposed merger of Ameritech Corporation and SBC Communications Inc. has been announced and is awaiting regulatory approvals.

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic -Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition, Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA L.P.O., New York SMSA L.P., Orange County-Poughkeepsie MSA L.P., Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Pittsburgh SMSA L.P., Pennsylvania RSA No. 6(II) L.P., Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, TELE-

TV, TELE-TV Media Partners, L.P., TELE-TV Systems, L.P., Global Directory Services Company, MEDIATEL spol. S.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. Z.o.o., Nord Trans Biuro Reklam Sp. Z.o.o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Limited, Gibralter NYNEX Communications Limited, ESI KF Limited Partnership, Omnitel-Pronto Italia, S.p.A., San Antonio MTA, L.P., Vermont RSA Ltd., Hudson Valley RSA Cellular Partnership, Tomcom, L.P., 1800 Arch Street, L.P., Tucson Cellular Telephone Company, Binghamton MSA Limited Partnership, Binghamton MSA Limited Partnership, Iron Venture III, Springfield Cellular Telephone Company, and Beaufoy Ltd.

The GTE Entities are GTE Services Corporation, GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Midwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE West Coast Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc. Each of the GTE Entities is a subsidiary of GTE Corporation, a public-held corporation that provides an array of telecommunications services both domestically and worldwide. GTE Corporation has the following subsidiaries or affiliates that have outstanding securities in the hands of the public:

Acentech Incorporated
AG Communication Systems Corporation
Anglo-Canadian Telephone Company
BABCN, L.L.C. (Service Net)
BBN Corporation
BCT.Telus Communications Inc.
BC TEL
Cable-Axion Digitel Inc.
Cable-Axion Quebec Inc.

Caribbean Reservation Center, C. por A.
CEIET Continental Telefone S.A.
Chesapeake Directory Sales Company
Comunicaciones Telefonicas, C. por A.
Compania Anonima Nacional Telefonos de Venezuela (CANTV)
Conagro Telecommunications, S.A.
Continental Telecommunications Company (Nigeria)
Continental Telephone of Saudi Arabia, Ltd.
CTI Compania de Telefonos del Interior S.A.
CTI Holdings, S.A.
CTI Norte Compania de Telefonos del Interior S.A.
Dantel
DELCOM, INC.
Digital Courier International Inc.
Domain Solutions Corporation
Equicom Systems Management, Inc.
GTE California Incorporated
GTE CyberTrust Japan Incorporated
GTE Directories (B) SDN.BHD.
GTE Directories Corporation Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE Industries Incorporated
GTE Leasing Corporation
GTE Midwest Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
GTE Sylvania S.A. Electronica, Quimica, Industrial y Commercial
GTE Telecom Saudi Arabia Ltd.
GTE Yellow Pages Publishing Hungary Kft
Herold Business Data AG
i2 Corporation
ISM Information Systems Management (B.C.) Corporation

La Compagnie de Telephone Anglo-Canadienne/Anglo-Canadian Telephone Company
Laycon Telecommunications, S.A.
LightStream Incorporated
Mobility Personacom Canada Ltd.
MTX Italia
Pacific Place Cable Ltd.
Page Saudi Arabia Services, LTD.
Panorama Polska Sp. z.o.o.
Parlance Corporation
Parque Industrial ITABO, S.A.
Quebec-Telephone
R.G.B. Technologies Inc.
Radiowealth, Inc.
Rapport Interactive Services Inc.
SCM Integrated Systems SDN.BHD
Sherkate Sahami Khass Telephone Sazi Iran
Signa Gateway Corporation
Stentor Resource Centre Inc.
Stentor Services Inc.
Telectronics Financing Corporation
The Micronesian Telecommunications Corporation
Unicist Communications Corp.
VenWorld Telecom, C.A.
Zona France Las Americas

In addition, GTE Corporation is a partner in the following partnerships and limited partnerships:

Alabama
Alabama 1-Franklin RSA Partnership
GTE Mobilnet of Florence, Alabama Incorporated
Gadsden Celltelco Partnership
Tuscaloosa Cellular Partnership

California
California RSA No. 4 Limited Partnership

Fresno MSA Limited Partnership
GTE Mobilnet of California Limited Partnership
GTE Mobilnet of Santa Barbara Limited Partnership

Florida
Florida RSA #1B (Naples) Limited Partnership

Illinois
Illinois RSA 1 Limited Partnership
Rockford MSA Limited Partnership

Indiana
GTE Mobilnet of Fort Wayne Limited Partnership
GTE Mobilnet of Indiana Limited Partnership
GTE Mobilnet of Indiana RSA #3 Limited Partnership
GTE Mobilnet of Indiana RSA #6 Limited Partnership
GTE Mobilnet of Terre Haute Limited Partnership
Indiana RSA #1 Limited Partnership
Southern Indiana RSA Limited Partnership

Iowa
Iowa RSA No. 4 Limited Partnership
Iowa RSA No. 5 Limited Partnership

Kentucky
Kentucky RSA No. 1 Partnership

New Mexico
New Mexico RSA 3 Limited Partnership
New Mexico RSA No. 5 Limited Partnership
New Mexico RSA 6-1 Partnership

North Carolina
Fayetteville Cellular Telephone Company Limited Partnership

Ohio
GTE Mobilnet of Ohio Limited Partnership
Ohio RSA #3 Limited Partnership

Tennessee
Knoxville Cellular Telephone Company

Texas
GTE Mobilnet of Austin Limited Partnership
GTE Mobilnet of South Texas Limited Partnership
GTE Mobilnet of Texas RSA #11 Limited Partnership
GTE Mobilnet of Texas RSA #16 Limited Partnership
GTE Mobilnet of Texas RSA #17 Limited Partnership
GTE Mobilnet of Texas RSA #21 Limited Partnership
Texas RSA 10B3 Limited Partnership

Virginia
Danville Cellular Telephone Company Limited Partnership
Virginia RSA 5 Limited Partnership
Virginia RSA 5 Retail Limited Partnership

U S WEST, Inc. has no parent companies and no non-wholly owned subsidiaries.

The United States Telephone Association ("USTA") is a non-profit trade association representing the interests of facilities-based local exchange and exchange access providers. These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. The *First Report and Order* and *Iowa Utilities Board* 2

B. The *Third Order* 3

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Cases:

AT&T Corp. v. Iowa Utilities Board, No. 97-826 (and consolidated cases) (U.S. Jan. 25, 1999) . . . . . *passim*

Iowa Utilities Board v. *FCC*, 120 F.3d 753 (1997) . . 2,3

Lawrence v. *Chater*, 116 S. Ct. 604 (1996) 5

Southwestern Bell Tel. Co. v. *FCC*, 153 F.3d 597 (8th Cir. 1997) 1

Statutes and Rules:

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 . . . . . *passim*

47 U.S.C. § 251(c)(3) 2

47 U.S.C. § 251(d)(2) . . . . . *passim*

47 C.F.R. § 51.319 . . . . . *passim*

Miscellaneous:

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1997) . . . . . *passim*

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Order on Reconsideration, 12 FCC Rcd 12460 (1997) . . . . . *passim*

Ameritech Corporation, Bell Atlantic Corporation, the GTE Entities, U S WEST, Inc., and the United States Telephone Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit (App. 1a-24a) is reported at 153 F.3d 597 (1998). The Eighth Circuit denied a petition for rehearing (App. 25a) in an unpublished order. The Federal Communications Commission ("FCC") order reviewed by the Eighth Circuit (App. 26a-84a) is reported at 12 FCC Rcd 12460 (1997).

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1998. A timely petition for rehearing was denied on December 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at App. 85a-87a.

STATEMENT

This case concerns the validity of an order issued by the Federal Communications Commission on August 18, 1997 ("the *Third Order*"),[1] pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act" or "1996 Act"). The *Third Order* concerns the scope of a requirement set forth in an earlier FCC order, called the

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 FCC Rcd 12460 (1997) ("*Third Order*") (App. 26a-84a), petition for review denied, *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 597 (8th Cir. 1998) (App. 1a-24a).

First Report and Order,[2] that this Court recently invalidated. See *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (and consolidated cases), slip op. at 20-25 (Jan. 25, 1999). Indeed, the *Third Order* applies the very interpretation of the 1996 Act that this Court held was inconsistent with the statute's plain terms.

A. The *First Report and Order* and *Iowa Utilities Board*

The 1996 Act opens local telephone markets by imposing certain obligations upon incumbent local exchange carriers ("incumbent LECs"). Among other things, the Act requires incumbent LECs to provide competitors with "unbundled" access to the "elements" of their networks. See 47 U.S.C. § 251(c)(3), (d)(2).

In its *First Report and Order*, the FCC promulgated regulations to implement the 1996 Act's local competition provisions and, in particular, the unbundled access provisions. The primary unbundling regulation, Rule 319, identified seven different network elements — the local loop; the network interface device; switching capability; interoffice transmission facilities; signaling networks and call-related databases; operations support systems; and operator services and directory assistance — and required incumbent LECs to provide those elements to competitors on an unbundled basis. See 47 C.F.R. § 51.319(a)-(g).

As part of its analysis supporting promulgation of Rule 319, the FCC purported to examine whether those seven network elements satisfied 47 U.S.C. § 251(d)(2). That pro-

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[2] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1997) ("*First Report and Order*"), vacated in part, *Iowa Utilities Board* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part & rev'd in part sub nom., *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (U.S. Jan. 25, 1999).

vision establishes the so-called "necessary and impair" standard, which requires the FCC, in determining which network elements should be subject to the Act's unbundling requirements, to consider whether access to a proprietary network element is "necessary," and whether lack of access to any network element would "impair" a competitor's ability to provide telecommunications services. Under its interpretation of Section 251(d)(2), the FCC determined that each of the seven network elements listed in Rule 319 fulfilled the "necessary and impair" standard. See *First Report and Order*, ¶¶ 388-393, 419-420, 447, 481-482, 490-491, 497-499, 521-522, 539-540.

On petitions for review, the Eighth Circuit approved the FCC's interpretation and application of the "necessary and impair" standard, and accordingly left Rule 319 intact. *Iowa Utiliies Board* v. *FCC*, 120 F.3d 753, 809-810 (1997). This Court reversed, holding that the FCC's interpretation of Section 251(d)(2) was contrary to the plain terms of the Act. *AT&T Corp.* v. *Iowa Utilities Board*, *supra*, slip op. at 22 (FCC's gloss on the "necessary and impair" standard "is simply not in accord with the ordinary and fair meaning of those terms"). Because the FCC's error infected its conclusion as to which network elements must be provided on an unbundled basis, the Court vacated Rule 319 in its entirety. *Id.*, slip op. at 25. The Court remanded the cause for the agency to determine which network elements satisfy the 1996 Act's unbundled access provisions, as properly interpreted.

B. The *Third Order*

The FCC issued the *Third Order* in the same rulemaking docket as the *First Report and Order*. Released after the Eighth Circuit had approved the FCC's interpretation of Section 251(d)(2) in the *First Report and Order*, but before this Court decided *Iowa Utilities Board*, the *Third Order* addressed the definition of "interoffice transmission facilities," one of the network elements to which unbundled access was required in (the now-vacated) Rule 319.

The *Third Order* arose out of two petitions for reconsideration and clarification filed by certain local exchange competitors. The *First Report and Order* required incumbent LECs to provide unbundled access to interoffice transmission facilities, and defined two types of interoffice transport, "shared" and "dedicated." See *First Report and Order*, ¶¶ 428-451; 47 C.F.R. § 51.319(d) (1996) (superseded by *Third Order*).[3] The competitors complained that the *First Report and Order*'s definition of "shared" interoffice transport, set forth in Rule 319(d)(1), was unclear. See *Third Order*, ¶ 20 (noting that "both petitions concerned the definition of shared transport as an unbundled network element") (App. 44a). They asked the FCC to hold that "shared transport" is a single network element consisting of the incumbent's entire interoffice network, including each and every interoffice transmission link in the local network.

The FCC granted the petitions and, as the competitors requested, amended the definition of "shared transport" in Rule 319(d)(1). See *Third Order*, Appendix A. In so doing, the FCC concluded that "shared transport" satisfied the Section 251(d)(2) "necessary and impair" standard, as that provision had been interpreted in the *First Report and Order*. See *Third Order*, ¶¶ 31-37, 49, 51 (citing *First Report and Order*, ¶¶ 283, 285-287, 419-420, 441, 446-447). The FCC left intact Rule 319(d)(2), which imposed the actual obligation upon incumbent LECs to provide unbundled access to interoffice transport. See 47 C.F.R. § 51.319(d)(2).

Numerous telecommunications carriers, including incumbent LECs, filed petitions for review of the *Third Order*. The incumbent LECs argued that permitting competitors to

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[3] The *First Report and Order* defined "shared" transport to be unbundled transmission facilities "shared by more than one customer or carrier," and "dedicated" transport to be unbundled transmission facilities "dedicated to a particular customer or carrier." 47 C.F.R. § 51.319(d)(1) (1996) (superseded by *Third Order*).

share an incumbent's entire existing interoffice network violated the 1996 Act's unbundling provisions. The incumbents asserted, among other things, that access to that interoffice network is not something that a competitor legitimately needs to compete in local service markets, but rather provides an unfair advantage that Congress never intended. The Eighth Circuit denied the petitions for review.

REASONS FOR GRANTING THE PETITION

The *Third Order* addresses the scope of the FCC requirement, set forth in Rule 319(d)(2) and the *First Report and Order*, that incumbent LECs provide unbundled access to "shared" interoffice transport. This Court has now invalidated that requirement as inconsistent with the 1996 Act. See *Iowa Utilities Board*, slip op. at 20-25. Thus, the foundation underlying the *Third Order* — *i.e.*, the existence of a regulation obligating incumbents to provide interoffice transport on an unbundled basis — has disappeared.

Because the *Third Order* alters the reach of a regulation that no longer exists, that Order should be vacated and remanded to the FCC. See *Lawrence* v. *Chater*, 116 S. Ct. 604, 607 (1996) (Supreme Court decisions rendered after the judgment below was issued are among the "intervening developments" supporting entry of a GVR); *id.* at 613-614 (Scalia, J., dissenting) (same) (citing cases).

In addition, in determining that "shared transport" satisfies Section 251(d)(2), the *Third Order* applied the interpretation of the "necessary and impair" standard that the FCC had adopted in the *First Report and Order*. See *Third Order*, ¶¶ 31-37, 49, 51. In *Iowa Utilities Board*, the Court held that interpretation to be unlawful, and directed the FCC on remand to determine whether, and (if so) to what extent, each of the seven network elements listed in Rule 319 (including interoffice transport) satisfies Section 251(d)(2). Thus, *Iowa Utilities Board* requires the FCC to revisit the very issues addressed in the *Third Order* — including the

scope of the (now-vacated) interoffice transport requirement, and whether the "shared" variety of interoffice transport satisfies Section 251(d)(2).

Finally, the *Third Order* is inexorably linked to the FCC's reconsideration of other network elements. In particular, the FCC must determine on remand whether the switching network element (see the now-vacated Rule 319(c)) satisfies the "necessary and impair" standard. As the FCC acknowledged in the *Third Order*, a competitor that "purchase[s] shared transport as a network element to provide local exchange service must also take local switching." *Third Order*, ¶ 47. Accordingly, whether incumbents may be required to provide unbundled access to "shared" interoffice transport will turn, at least in part, upon whether (and, if so, to what extent) switching is found to satisfy the 1996 Act's unbundled access provisions.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the cause remanded for reconsideration with the network element remand proceedings from *AT&T Corp.* v. *Iowa Utilities Board*, *supra*.

Respectfully submitted.

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FEBRUARY 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3389

Southwestern Bell Telephone Company,

Petitioner,

Ameritech Corporation; Time Warner; Communications Holdings; US Telephone Association; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Communications Minnesota, Inc.; Contel of the South, Inc.; Association for Local Telecommunications Services; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3576

US West, Inc.,

Petitioner,

Southwestern Bell Telephone Company,

Intervenor on Appeal,

Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Ameritech Corporation; Time Warner Communications Holdings, Inc.; Association for Local Telecommunications Services; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE Southwest, Incorporated; GTE South, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.;

Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3663

Ameritech Corporation,

Petitioner,

Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications

Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal,

No. 97-4106

Southern New England Telephone Company,

Petitioner,

Independent Telephone and Telecommunications Alliance; Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.;

Competitive Telecommunications Association,

Intervenors on Appeal.

Petitions for Review
of an Order of the
Federal Communications Commission

JUDGMENT

This cause was submitted on the petition for review of an order of the Federal Communiations Commission, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the order of the Federal Communications Commission is affirmed in accordance with the opinion of this Court.

The consolidated petitions for review are denied.

August 10, 1998

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3389

Southwestern Bell Telephone Company,

Petitioner,

Ameritech Corporation; Time Warner Communications Holdings; US Telephone Association; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Association for Local Telecommunications Services; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3576

US West, Inc.,

Petitioner,

Southwestern Bell Telephone Company,

Intervenor on Appeal,

Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Ameritech Corporation; Time Warner Communications Holdings, Inc.; Association for Local Telecommunications Services; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE Southwest, Incorporated; GTE South, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications

Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

No. 97-3663

Ameritech Corporation,

Petitioner,

Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; Independent Telephone and Telecommunications Alliance,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications

Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal,

No. 97-4106

Southern New England Telephone Company,

Petitioner,

Independent Telephone and Telecommunications Alliance; Ameritech Corporation; Time Warner Communications Holdings, Inc.; US Telephone Association; Association for Local Telecommunications Services; Southwestern Bell Telephone Company; GTE Service Corporation; GTE Alaska, Incorporated; GTE Arkansas, Incorporated; GTE California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of Minnesota, Inc.; Contel of the South, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-Delaware, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company,

Intervenors on Appeal,

v.

Federal Communications Commission; United States of America,

Respondents,

American Telephone and Telegraph Company; Telecommunications Resellers Association; MCI Telecommunications Corporation; LBC Communications, Inc.; Worldcom, Inc.; Competitive Telecommunications Association,

Intervenors on Appeal.

Petitions for Review
of an Order of the
Federal Communications Commission

Submitted: January 15, 1998
Filed: August 10, 1998

Before BOWMAN,[1] WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Pursuant to 47 U.S.C. § 402(a) (1994) and 28 U.S.C. § 2342(1) (1994), various incumbent local exchange carriers (incumbent LECs)[2] petition for review of the Federal Communication Commission's (FCC's) Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 12 FCC

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[1] The Hon. Pasco M. Bowman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 18, 1998.

[2] Ameritech Corp., Southern New England Telephone Co., Southwestern Bell Telephone Company, and U.S. West, Inc. all filed petitions for review. These petitions have been consolidated, and Bell Atlantic Telephone Companies, GTE Entities, and United States Telephone Association have all intervened in support of the consolidated petitions. We refer to this group collectively as "petitioners" throughout.

Rcd. 12460 (Aug. 18, 1997) (Third Order on Reconsideration). The consolidated petitions challenge both the FCC's determination that shared transport constitutes a network element as defined by 47 U.S.C.A. § 153(29) (West Supp. 1998), and the FCC's determination that incumbent LECs must make shared transport available to new entrants on an unbundled basis pursuant to 47 U.S.C.A. § 251(c)(3), (d)(2). We affirm the FCC's order and deny the consolidated petitions for review.

I.

In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of Title 47, United States Code) (the Act).[3] The issues presented in this case relate to the Act's local competition provisions. The Act requires incumbent LECs to allow new entrants access to their networks in three different ways. Specifically, a LEC must (1) permit requesting competitors to interconnect with the LEC's local network, (2) provide competitors with access to individual elements of its network on an unbundled basis, and (3) allow competitors to purchase its telecommunications services for resale. 47 U.S.C.A. § 251(c)(2)-(4). Together, these duties regarding interconnection, unbundled access, and resale are intended to provide would-be competitors with realistic opportunities to enter the market for local exchange service.

The issues presented in the consolidated petitions for review pertain to the incumbent LECs' duties regarding unbundled access. Section 251(c)(3) requires incumbent LECs to provide new entrants with "nondiscriminatory access to *network elements* on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." (emphasis added). The Act defines "network element" as follows:

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[3] All citations to sections and subsections of the Act are to the 1998 Supplement to West's United States Code Annotated.

> The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C.A. § 153(29).

Although Congress defined the term "network element" in the Act, it invested the FCC with the authority to determine *which* network elements should be made available to new entrants on an unbundled basis. *See* 47 U.S.C.A. § 251(d)(2). Section 251(d)(2) limits the FCC's authority in this regard only insofar as it requires the FCC to consider two factors "at a minimum" as it makes this decision. These factors are whether "access to such network elements as are proprietary in nature is necessary," and whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.*

On August 8, 1996, the FCC issued its First Report & Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd. 15499 (Aug. 8, 1996) (First Report & Order), in which it established rules to implement the local competition provisions of the Act. In this order, the FCC identified various network elements and determined, pursuant to its authority under section 251(d)(2), that an incumbent LEC must make each of the elements the FCC had identified available to the LEC's competitors on an unbundled basis. *See* First Report & Order ¶ 262; *id.* at A.P. B (47 C.F.R. § 51.319).[4] Salient for our purposes is the FCC's treatment of interoffice transmission facilities, specifically *shared* interoffice transmission facilities. Interoffice transmission facilities

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[4] Because the version of 47 C.F.R. § 51.319 attached to the First Report & Order differs in relevant respects from the current version, we refer to appendix B of the First Report & Order when speaking of the regulation as originally adopted in that order.

are the highways of the local exchange. They connect the end offices and tandem switches within the local exchange to one another and carry telephone traffic between and among these offices and switches. *See* First Report & Order, A.P.. B (47 C.F.R. § 51.319(d)(1)). Interoffice transmission facilities are distinct from both the local loops, which connect end users to the local exchange, *see id.* (47 C.F.R. § 51.319(a)), and the various switches (local and tandem), which determine which interoffice transmission facilities are used to transport the traffic from switch to switch, *see id.* (47 C.F.R. § 51.319(c)). In its First Report & Order, the FCC emphasized that switching and transport are distinct network elements, each of which must separately be made available to entrants on an unbundled basis. *See id.* ¶¶ 410, 440; *accord* 47 U.S.C.A. § 271(c)(2)(B)(v, vi) (requiring LECs to offer "[l]ocal transport . . . unbundled from switching or other services" and "[l]ocal switching unbundled from transport, local loop transmission, or other services").

In the First Report & Order, the FCC distinguished *dedicated* transmission facilities from shared transmission facilities, and treated each separately for purposes of unbundled access. *Id.* (47 C.F.R. § 51.319(d)(1)). Dedicated transmission facilities, which do not here concern us, are those transmission facilities used by a single customer or carrier. *Id.* Shared transmission facilities, on the other hand, carry traffic of multiple customers or carriers. *Id.* Regarding shared transmission facilities, the FCC initially determined only that incumbent LECs must provide "unbundled access to shared transmission facilities between end offices and the tandem switch." *Id.* ¶ 440. The FCC did not explain its meaning in detail, but some of its comments suggested that the FCC perhaps anticipated that each individual shared transmission facility—i.e., each link—must be made available as a separate unbundled network element. *See id.* ¶ 442 ("We find that it is technically feasible for LECs to unbundle the foregoing interoffice facilities as individual network elements."); *id.* ¶ 441 ("By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis as part of a competing network, or it can combine its own interoffice facilities with those of the incumbent LEC."); ***but see*** *id.* at App. B (47 C.F.R. § 51.319(d)(2)) (referring to the "use of

the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier."). The exact nature of the incumbent LECs' unbundling duties regarding shared transmission facilities remained subject to dispute until the FCC issued its Third Order on Reconsideration, discussed below.

On July 18, 1997, this court issued an opinion in which we affirmed in part and vacated in part the FCC's First Report & Order. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 819-20 (8th Cir. 1997), *cert. granted sub nom., AT&T Co. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998). In particular, we affirmed the FCC's determination that various features, functions and capabilities of the local exchange network, such as operational support services, operator services, and signaling systems, were "network elements" for purposes of the Act. *Iowa Utils. Bd.*, 120 at 808-10. We similarly affirmed the FCC's determination that various facilities, such as interoffice transmission facilities, fell within the statutory definition of network element. See *id.* at 818 n.38 (implying by omission that this regulation was upheld). Finally, we upheld the FCC's section 251(d)(2) determination that the network elements it had recognized should be made available to competitors on an unbundled basis. *Id.* at 808, 809-10.

After the FCC issued its First Report & Order, various interested parties filed petitions for reconsideration and clarification with the FCC. Two of these petitions requested clarification regarding what incumbent LECs must do to make shared transmission facilities available to new entrants on an unbundled basis, pursuant to 47 U.S.C.A. § 251(c)(3). On August 18, 1997, the FCC issued its Third Order on Reconsideration, in which it addressed the issues presented in these two petitions. The FCC acknowledged that, in its First Report & Order, it had only required incumbent LECs to "provide 'shared transport' between the end office and tandem." Third Order on Reconsideration ¶ 2. Upon reconsideration, the FCC eliminated this limitation, concluding that incumbent LECs "should be required to provide requesting carriers with access to shared transport for all transmission facilities connecting LECs' switches—that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches." *Id.* ¶ 2; *see also id.*

¶¶ 25, 26; *id.* at App. A (47 C.F.R. § 51.319)(d)(1)(ii)). Additionally, the FCC clarified that the function of "shared transport" constitutes a *single* network element, and directed incumbent LECs to make this function available on an unbundled basis. *See id.* ¶¶ 25-26, 33, 42-43, 47.

The consolidated petitions seek review of the FCC's Third Order on Reconsideration, arguing that it is contrary to both the Telecommunications Act of 1996 and this court's decision in *Iowa Utilities Board*. We affirm the FCC's order and deny the petitions for review.

II.

We have jurisdiction to review final orders of the FCC pursuant to 28 U.S.C. § 2342(1) (1994) and 47 U.S.C. § 402(a) (1994). As we noted in *Iowa Utilities Board*, 120 F.3d at 793, we defer to administrative interpretations of statutes unless they conflict with the plain meaning of a statute, unreasonably construe an ambiguous statute, or are arbitrarily or capriciously adopted. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). We emphasize here, as we did in *Iowa Utilities Board*, that we in no way purport to evaluate the wisdom or prudence of the policy decisions underlying the Act. 120 F.3d at 793. Rather, if we find that the agency's reading of a statute is a permissible one, "we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.'" *Regions Hosp. v. Shalala*, 118 S. Ct. 909, 915 (1998) (quoting *Chevron*, 467 U.S. at 843 n.11).

A. The Designation of "Shared Transport" as a Network Element is Consistent with the Act and Our Decision in *Iowa Utilities Board*.

Petitioners argue that the FCC misinterpreted the Act when it determined that shared transport constitutes a network element as defined in section 153(29). They argue that, because the First Report & Order (arguably) defined each shared transmission facility between an end office and a tandem switch as a *separate* network element, the FCC has no power to aggregate all of an

incumbent LEC's shared transmission facilities and designate the function which these facilities serve—shared transport—as a single network element. They further argue that because the function of "shared transport" constitutes so significant a portion of the local exchange, it cannot be considered a mere "network element." We disagree.

The term "network element" is defined by the Act. This definition states that both the individual "facilit[ies] or equipment" of the local exchange *and* the "features, functions, and capabilities which are provided by means of such facilit[ies] or equipment" constitute "network elements" for purposes of the Act. *See* 47 U.S.C.A. § 153(29); *see also Iowa Utils. Bd.*, 120 F.3d at 809. For this reason, we held in *Iowa Utilities Board* that operational support services, operator services, directory assistance, call waiting, caller I.D., call forwarding, and signaling—all features or functions supported by a variety of different facilities or equipment—fell within the statutory definition of "network element." *See* 120 F.3d at 809. There we wrote as follows:

> Simply because these capabilities can be labeled as "services" does not convince us that they were not intended to be unbundled as network elements. While subsection 251(c)(4) does provide for the resale of telecommunications services, it does not establish resale as the exclusive means through which a competing carrier may gain access to such services. We agree with the FCC that such an interpretation would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3). We believe that in some circumstances a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale. [The features then at issue] satisfy the definition of "network element;" consequently, they are subject to the unbundling requirements of subsection 251(c)(3).

Id. at 809-10 (footnote omitted).

Using the same logic, we conclude that shared transport is similarly a network element. It is a "feature, function, [or]

capability," and it is provided by facilities and equipment used in the provision of a telecommunications service. The statutory definition requires no more. *See* 47 U.S.C.A. § 153(29). In fact, the question presented in the case at hand is easier than the one we dealt with in the above-quoted passage of *Iowa Utilities Board*. There, we dealt with "finished services"[5] such as directory assistance and operations support services, while here, we deal with shared transport, which petitioners acknowledge is of no use whatsoever unless a new entrant additionally purchases switching. (*See* Br. for Pet'rs Ameritech , et al., at 29.) Accordingly, we conclude that the plain meaning of the statute supports the FCC's determination that shared transport is a network element as defined in section 153(29). *See Chevron*, 467 U.S. at 842-43.

B. The FCC's Determination that Incumbent LECs Must Make "Shared Transport" Available to Entrants on an Unbundled Basis Comports With the Act.

Logically separate from the FCC's designation of shared transport as a network element is the FCC's determination that incumbent LECs must make shared transport available to entrants on an unbundled basis pursuant to section 251(c)(3). As discussed above, section 251(d)(2) provides the FCC with the authority to make such determinations and does not limit this authority except to direct the FCC to consider two factors as it does so. First, the FCC must consider whether "access to such network elements as are proprietary in nature is necessary." 47 U.S.C.A. § 251(d)(2)(A). Second, it must consider whether "the failure to provide access to such network elements would impair the ability

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[5] In Iowa Utilities Board, we were careful not to rule on the issue of whether operator services, directory assistance, caller I.D., call forwarding, and call waiting could be classified as "services" subject to the resale provisions of the Act, because that question was not properly before us. See 120 F.3d at 810 n.29 ("Even though the parties seem to agree that operator services, directory assistance, caller I.D., call forwarding, and call waiting can also be classified as 'services,' we make no ruling on this particular issue."). We held simply that these functions, features, and capabilities constituted network elements and were subject to the unbundling requirements of subsection 251(c)(3), regardless of whether they additionally could be considered services. Id. at 809-10.

of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2)(B).[6]

Where, as it has here in § 251(d)(2), Congress expressly delegates to an agency the power to formulate policy and fill gaps in a statutory scheme, we defer to agency regulations promulgated pursuant to such delegation "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843. Here, Congress limited the FCC's authority only by directing it to consider "at a minimum" the two above-described factors, and petitioners do not argue that the FCC failed to give adequate consideration to either one. 47 U.S.C.A. § 251(d)(2). In fact, petitioners do not assert that the FCC violated the express language of section 251(d)(2) or any other provision of the Act. Rather, petitioners argue that the FCC's decision that incumbent LECs must provide shared transport on an unbundled basis is inconsistent with Congress's overarching intention of maintaining a meaningful distinction between unbundled access to network elements and resale.

The distinction between unbundled access and resale is important, petitioners argue, because sections 251(c)(3) and 252(d)(1) require incumbent LECs to provide unbundled access at cost-based rates, while sections 251(c)(4) and 252(d)(3) allow incumbent LECs to provide retail services for resale at a higher price, equal to the LEC's retail subscriber rates less avoided costs. Petitioners argue that, if use of all of an incumbent LEC's shared transport facilities may be collectively purchased on a per-minute-of-use basis, entrants will effectively be able to purchase preassembled platforms for resale at the lower cost-based price reserved for unbundled access to network elements. Petitioners argue that if this is allowed to occur, the distinction between resale and unbundled access will be obliterated.

This argument is predicated on petitioners' speculative assumption that shared transport will be priced on a usage-sensitive basis. Because the pricing scheme for shared transport (and all other unbundled elements) will be determined by the state

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[6] We upheld the FCC's interpretation of section 251(d)(2) in Iowa Utilities Board. See 120 F.3d at 810-12.

commissions, *see* 47 U.S.C.A. § 252(c)(2); *Iowa Utils. Bd.*, 120 F.3d at 818, it is impossible for this court to determine at this time whether shared transport will be priced in such a way as to erode the distinction between resale and unbundled access. Since, as in *Iowa Utilities Board*, "we do not know what the state-determined rates [or even what the rate structure] will be," it follows that petitioners' arguments regarding the actual costs that entrants will incur are "speculative at best." 120 F.3d at 816. Until the state commissions exercise their authority to determine how shared transport will be priced (i.e., whether on a flat, use-sensitive, or other basis, and at what price), we could do no more than conjecture as to whether the unbundled sale of shared transport will erode the careful distinction between resale and unbundled access. Accordingly, we decline at this time to consider petitioners' argument to this effect. There will be time enough to do so once a state commission has compiled a record, applied its expert analysis, and rendered a decision, and an appeal has been taken to a federal district court pursuant to § 252(e)(6).

Petitioners also argue that the FCC's determination that incumbent LECs must provide shared transport on an unbundled basis is inconsistent with *Iowa Utilities Board*, in which we wrote:

> [Section] 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new

> entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

120 F.3d at 813.

Petitioners argue that this holding should be read to prohibit the FCC from requiring incumbent LECs to provide shared transport as a single unbundled element at a cost-based price. They argue that treating shared transport as a single unbundled element is the functional equivalent of requiring incumbent LECs to combine individual transmission facilities, which are themselves network elements, and provide them to new entrants on a bundled basis. They argue that by defining "shared transport" broadly as a function derived from numerous shared transmission facilities, the FCC has acted in contravention of our *Iowa Utilities Board* decision.

In support of this reading, petitioners quote then-FCC Chairman Reed Hundt, who opined that the Third Order on Reconsideration "highlights the importance we place on incumbents making available to new entrants their network elements on a combined basis." Separate Statement of Chairman Reed Hundt (attached to the Third Order on Reconsideration). We conclude that Chairman Hundt's remarks were addressed to the provisions of 42 C.F.R. § 51.315(b), which then prohibited an incumbent LEC from separating requested network elements that it currently combined in its own configuration. Because we had not yet vacated subsection 315(b) when the FCC issued its Third Order on Reconsideration, the FCC believed at that time that it could prevent LECs from disassembling the combinations of individual network elements that the LECs had already assembled in various configurations to provide local telecommunications services. *See* Third Order on Reconsideration ¶ 44. Shortly after the issuance of the Third Order on Reconsideration, we vacated subsection 315(b) in response to a petition for rehearing. *See Iowa Utils. Bd.*, 120 F.3d at 813. Accordingly, to the extent that the FCC relied on subsection 315(b) as support for the Third Order on Reconsideration, that reliance is no longer justified.

Mr. Hundt's remarks and paragraph 44 notwithstanding, we respectfully disagree with petitioners' argument that the Third

Order on Reconsideration violates our mandate in *Iowa Utilities Board*. While the existence of § 51.315(b) may have provided some additional support for the FCC's determination that shared transport is a network element subject to unbundled access, it was certainly not the principal basis for that determination. As discussed above, the statutory definition of "network element" contained in § 153(29) expressly includes both individual network facilities and the functions which those facilities provide, either individually or in consort. Pursuant to section 251(d)(2), it is within the authority of the FCC to determine which of these network elements—the facilities, the functions, or both—incumbent LECs must make available on an unbundled basis. Accordingly, when the FCC made its decision on reconsideration regarding shared transport, it was acting according to express statutory authority.

In *Iowa Utilities Board*, on the other hand, the FCC was acting in the absence of any statutory authority and in violation of section 251(c)(3) of the Act. There we were faced with the FCC's attempt to force incumbent LECs to make available precombined packages of already assembled network elements (i.e., platforms), which the FCC had never suggested were themselves network elements. Because the Act does not invest the FCC with the authority to require LECs to "bundle" elements and provide them on a combined basis, and because section 251(c)(3) expressly provides that network elements are to be provided on an "unbundled" basis "that allows requesting carriers to combine such elements," we held that the FCC had violated the Act. *See* 120 F.3d at 813.

In short, because the FCC action currently at issue—requiring LECs to provide access to shared transport on an unbundled basis—was made pursuant to express statutory authority, this case is distinguishable in this important respect from *Iowa Utilities Board*, where we held that the FCC had no authority to order LECs to combine network elements. Because we find that the statutory authority provided in §§ 153(29) and 251(d)(2) is sufficient, standing alone, to support the FCC's determination that shared transport is a network element, the fact that the FCC may

have also relied on a rule (§ 51.315(b)) we later vacated is of little consequence.

Indeed, we believe that our decision in *Iowa Utilities Board* supports our decision in the case at hand. As discussed *supra* under subheading A, we expressly upheld the FCC's section 251(d)(2) determination that various "functions" should be provided on an unbundled basis, notwithstanding the fact that these functions could also be considered finished services purchasable for resale pursuant to section 251(c)(4). *See Iowa Utils. Bd.*, 120 F.3d at 809 (acknowledging that "a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale"). If the FCC may require incumbent LECs to provide unbundled access to functions and capabilities which may also be purchasable at retail as "finished services" (e.g., caller I.D., call waiting, call forwarding, operator services, and directory assistance), it certainly may require LECs to provide unbundled access to a separate function or capability such as shared transport which, when combined with other network elements, enables a new entrant to provide local telecommunications service.

In short, we hold that the FCC's determination that shared transport should be made available to entrants on an unbundled basis is not arbitrary, capricious, or otherwise contrary to law. *See Chevron*, 467 U.S. at 843.

C. The FCC Did Not Assert Pricing Authority in the Third Order on Reconsideration.

Petitioners and intervenors have expressed concern regarding paragraphs 30 and 35 of the Third Order on Reconsideration, in which the FCC opined that shared transport should be priced on a usage-sensitive, per-minute-of-use basis. Petitioners correctly note that, under our cases, the FCC has no authority to establish pricing for shared transport or any other network element. *See Iowa Utils. Bd.*, 120 F.3d at 794-96; *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 537-38 (8th Cir. 1998), *petitions for cert. filed*, 66 U.S.L.W. 3672 (March 13, 1998) (Nos. 97-1519 & 97-1520).[7]

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[7] Only when a state commission fails to act to carry out its

Clearly, any attempt by the FCC to assert authority over the pricing of unbundled network elements would violate both the Act as we read it and our decision in *Iowa Utilities Board*. However, we do not believe that the relevant passages of the Third Order on Reconsideration reflect any such attempt on behalf of the FCC. We read the relevant language in both paragraphs 30 and 35 to be dicta, in which the FCC expresses its opinion as to how the states ought to approach the question of pricing. Clearly, the FCC expresses a preference for usage-based pricing, but it follows this discussion with an express acknowledgment that, pursuant to *Iowa Utilities Board*, it "may not establish pricing rules for shared transport." Third Order on Reconsideration ¶ 30. In light of this express acknowledgment, we reject petitioners' assertion that language in either paragraph 30 or 35 represents an attempt to assert pricing authority in disregard of our *Iowa Utilities Board* decision.

Finally, we agree with petitioners that certain unvacated language in the First Report & Order can be read to assert pricing authority. *See id.* ¶ 258 ("Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities *on a minute-by-minute basis*.") (emphasis added). However, this language was drafted before our decisions in *Iowa Utils. Bd.*, 120 F.3d at 793-800, and *Iowa Utils. Bd.*, 135 F.3d at 537-38, and we believe the FCC's current position is as expressed in paragraph 30 of the Third Order on Reconsideration.

III.

Accordingly, we deny the consolidated petitions for review and affirm the Federal Communications Commission's Third Order on Reconsideration.

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responsibility under § 252 to determine rates for unbundled access to network elements is the FCC authorized to step in and assume the state commission's pricing role. 47 U.S.C.A. § 252(e)(5).

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3389 / 3576 / 3663 / 4106

Southwestern Bell Telephone Company, et al.,	*	
Petitioners,	*	Petitions for Review of an Order
vs.	*	of the Federal Communications
Federal Communications Commission, et al.,	*	Commission
Respondents.	*	

The petition for rehearing filed by the petitioners has been considered by the court and is denied.

December 4, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

Third Order on Reconsideration
and
Further Notice of Proposed Rulemaking

Adopted: August 18, 1997 Released: August 18, 1997

FNPRM Comment Date: October 2, 1997
FNPRM Reply Date: October 17, 1997

By the Commission: Chairman Hundt issuing a separate statement.

Table of Contents

I. INTRODUCTION 1

II. BACKGROUND 4
A. Local Competition Order 4
B. Petitions 7

III. DISCUSSION 19
A. Incumbent LECs' obligation regarding shared transport 25
B. Application of the requirements of section 251(d)(2) to shared transport 31
C. Use of shared transport facilities to provide exchange access service 38
D. Response to Specific Arguments Raised by Parties 40

E. Final Regulatory Flexibility Analysis 53

IV. FURTHER NOTICE OF PROPOSED RULEMAKING 60
A. Discussion 60
B. Procedural Matters 62

V. ORDERING CLAUSES 75

I. INTRODUCTION

1. In this Order, we address two petitions for reconsideration or clarification of the *Local Competition and Order*[1] regarding the obligation of incumbent local exchange carriers (LECs) to provide unbundled access to interoffice transport facilities on a shared basis.[2] We intend to address petitions for reconsideration of other aspects of the *Local Competition Order* in the future.

2. In the *Local Competition Order*, which established rules to implement sections 251 and 252 of the Communications Act of 1934 (the Act),[3] as amended by the Telecommunications Act of 1996,[4] the Commission required incumbent LECs "to provide unbundled access to shared transmission facilities between end

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, aff'd in part and vacated in part sub. nom. CompTel. v. FCC*, 11 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, 1997 WL 403401 (8th. Cir., Jul. 18, 1997) (*Iowa Utilities Bd.*).

[2] 47 C.F.R. § 51.319(d).

[3] 47 U.S.C. § 251.

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.*

offices and the tandem switch."[5] In this reconsideration order, we first explain that the *Local Competition Order* required incumbent LECs to provide requesting carriers with access to the same transport facilities, between the end office switch and the tandem switch, that incumbent LECs use to carry their own traffic. We further explain that, when a requesting carrier takes unbundled local switching, it gains access to the incumbent LEC's routing table, resident in the switch. Second, we reconsider the requirement that incumbent LECs only provide "shared transport"[6] between the end office and tandem. For the reasons discussed below, we conclude that incumbent LECs should be required to provide requesting carriers with access to shared transport for all transmission facilities connecting incumbent LECs' switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. Third, we conclude that incumbent LECs must permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table and transport links that the incumbent LEC uses to route and carry its own traffic. By requiring incumbent LECs to provide requesting carriers with access to the incumbent LEC's rounting table and to all its interoffice transmission facilities on an unbundled basis, requesting carriers can route calls in the same manner that an incumbent routes its own calls and thus take advantage of the incumbent LEC's economies of scale, scope, and density. Finally, incumbent LECs must permit requesting carriers to use shared transport as an unbundled element to carry originating access traffic from, and terminating access traffic to, customers to whom the requesting carrier is also providing local exchange service.

3. We also issue a further notice of proposed rulemaking seeking comment on whether requesting carriers may use shared transport facilities in conjunction with unbundled switching, to

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[5] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440.

[6] Section 51.319(d) of the Commission's rules requires that incumbent LECs provide access on an unbundled basis to interoffice transmission facilities shared by more than one customer or carrier. 47 C.F.R. § 51.319(d). In this reconsideration order, we refer to such shared interoffice transmission facilities as "shared transport."

originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service. Moreover, we seek comment on whether requesting carriers may use dedicated transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.

II. BACKGROUND

A. Local Competition Order

4. Sections 251(c)(3) and 251(d)(2) of the Act set forth standards for identifying unbundled network elements that incumbent LECs must make available to requesting telecommunications carriers.[7] Section 251(c)(3) requires incumbent LECs to provide requesting carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."[8] Section 251(d)(2) provides that, in identifying unbundled elements, the "Commission shall consider, at a minimum, whether--

> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[9]

5. In the *Local Competition Order*, the Commission, pursuant to sections 251(c)(3) and 251(d)(2), identified a minimum list of seven network elements to which incumbent LECs must provide access on an unbundled basis. These network elements included local switches, tandem switches, and interoffice transmission facilities. With respect to interoffice transmission facilities, the Commission required incumbent LECs to provide

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[7] 47 U.S.C. §§ 251(c)(3) and (d)(2).

[8] 47 U.S.C. § 251(c)(3).

[9] 47 U.S.C. § 251(d)(2).

requesting telecommunications carriers access to both dedicated and "shared" interoffice transmission facilities.[10] The Commission defined "interoffice transmission facilities" as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.[11]

The Commission stated that "[f]or some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, [ãnd for] other elements, especially shared facilities such as common transport, [carriers] are essentially purchasing access to a functionality of the incumbent's

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[10] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440. 47 C.F.R. § 51.319(d)(2) states:

> The incumbent LEC shall:
>
> (i) provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;
>
> (ii) provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;
>
> (iii) permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities . . . .

47 C.F.R. § 51.319(d)(2).

[11] 47 C.F.R. § 51.319(d)(1).

facilities on a minute-by-minute basis."[12] In defining the network elements to which incumbent LECs must provide access on an unbundled basis, the Commission adopted the statutory definition of unbundled elements as physical facilities of the network, together with the features, functions, and capabilities associated with those facilities.[13] The Commission concluded that "the definition of the term network element includes physical facilities, such as a loop, switch, or other node, as well as logical features, functions, and capabilities that are provided by, for example, software located in a physical facility such as a switch."[14] The Commission found that:

> the embedded features and functions within a network element are part of the characteristics of that element and may not be removed from it. Accordingly, incumbent LECs must provide network elements along with all of their features and functions, so that new entrants may offer services that compete with those offered by incumbents as well as new services.[15]

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[12] *Local Competition Order*, 11 FCC Rcd at 15631, para. 258.

[13] The Act defines the term "network element" as:

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 3 (29).

[14] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260.

[15] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260.

The Commission also determined that "we should not identify elements in rigid terms, but rather by function."[16]

6. On July 18, 1997, the United States Court of Appeals for the Eighth Circuit issued a decision affirming certain of the Commission's rules adopted in the *Local Competition Order*, and vacating other rules.[17] With respect to issues relevant to this reconsideration decision, the court affirmed the Commission's authority to identify unbundled network elements pursuant to section 251(d)(2), and generally upheld the Commission's decision regarding incumbent LECs' obligations to provide access to network elements on an unbundled basis.[18] The order we issue today is consistent with the court's decision.

B. Petitions

7. Parties contend that the *Local Competition Order* is not clear with respect to incumbent LECs' obligation to provide access to shared transport as a network element. Although only two petitions for reconsideration, filed by WorldCom, Inc. (WorldCom) and the Local Exchange Carriers Coalition (LECC), seek clarification or reconsideration of what incumbent LECs must provide pursuant to section 251(c)(3) with regard to "shared transport," several parties addressed that issue in oppositions to petitions for reconsideration and replies. Moreover, since the record closed in the reconsideration proceeding, some parties have made numerous *ex parte* presentations in this docket regarding their views on the proper definition of shared transport as a network element.

8. The record indicates that one basis for confusion is the discrepancy between our rule defining interoffice transmission facilities under section 251(c)(3), 47 C.F.R. § 51.319(d), and the rule that establishes the rate structure standard for shared transport,

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[16] *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

[17] *Iowa Utilities Bd. v. FCC*, 1997 WL 403401 (8th Cir. July 18, 1997). *See* n.1 *supra*.

[18] *Iowa Utilities Bd.* at *22-24.

47 C.F.R. § 51.509(d). The Eighth Circuit vacated the Commission's rule, 47 C.F.R. § 51.509(d), which established the rate structure standard for shared transport.[19] Although the discrepancy between our rule defining interoffice transmission facilities and the rate structure rule no longer exists, we nevertheless believe that it is useful to clarify the Commission's rules regarding shared transport. The definition of interoffice transmission facilities includes transmission facilities "dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers[20] owned by incumbent LECs or requesting telecommunications carriers, or *between switches* owned by incumbent LECs or requesting telecommunications carriers."[21] The rule setting forth the rate structure for shared transport, which has been vacated by the Eighth Circuit, addressed only "[s]hared transmission facilities *between tandem switches and end offices*."[22] In the *Local Competition Order*, we promulgated no rules mandating the rate structure for shared transport *between end offices*. WorldCom requests that the Commission clarify that incumbent LECs must offer a usage option for shared transport

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[19] *Iowa Utilities Bd.* at *9, n.20.

[20] A wire center, or serving wire center, is defined as a telephone company central office designated by the telephone company to serve the geographic area in which the interexchange carrier or other person's point of demarcation is located. 47 C.F.R. § 69.2(rr).

[21] *See* 47 C.F.R. §51.319(d) (emphasis added). Switches include both end office and tandem switches.

[22] 47 C.F.R. § 51.509(d) (emphasis added). That rule (now vacated) stated:

> (d) Shared transmission facilities between tandem switches and end offices. The costs of shared transmission facilities between tandem switches and end offices may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

47 C.F.R. § 51.509(d).

regardless of whether the traffic is routed through the tandem.[23] LECC requests that the Commission clarify that shared transmission facilities must be provided to a requesting carrier only "in conjunction with" both a local switching and tandem switching capability.[24]

9. More fundamentally, parties ask the Commission to clarify, or reconsider, the definition of shared transport. WorldCom asks the Commission to clarify that section 251(c)(3) requires incumbent LECs to provide shared transport as a network element pursuant to a usage option whereby the requesting carrier pays a single, usage based rate for the routing functionality between the end office and the serving wire center (SWC).[25] LECC, on the other hand, asserts that "transmission facilities are 'shared' only if they are associated with switching capability. If they are not so associated, such facilities presumably must be considered dedicated facilities."[26]

10. In support of WorldCom's petition, various competitive carriers argue that the Commission was clear in the *Local Competition Order* that "shared transport," as defined by the Commission, requires incumbent LECs to make available to requesting carriers access to all transport links between any two incumbent LEC switches (*i.e.*, between two end office switches, between an end office switch and a tandem switch, or between two

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[23] WorldCom Petition at 2, 6-7. *Accord* CompTel Opposition at 3-4 (FCC should establish a usage option for all transport over shared facilities between two incumbent LEC end offices); Sprint Opposition at 6-7 (shared transport to take traffic directly from one end-office switch to another is the most economical means of handling the traffic).

[24] LECC Petition at 33. *Cf.* NYNEX Opposition at 10 (traditionally, shared facilities are only provided by an incumbent LEC between its central offices and its tandems, and not between its central offices and the switching facilities of another carrier).

[25] Worldcom Petition at 2-5. *See also* MCI Opposition at 18; Sprint Opposition at 6.

[26] LECC Petition at 33.

tandem switches) on a per minute of use basis.[27] AT&T notes that, in defining unbundled network elements, the Commission stated that the definition includes "all the features, functions, and capabilities that are provided by means of such facility or equipment" and that "carriers seeking . . . shared facilities, such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis."[28] WorldCom claims that the 1996 Act and the Commission's rules make clear that carriers taking unbundled local switching have the right to use the incumbent LEC's entire interoffice network on a cost based, nondiscriminatory basis to complete local calls. WorldCom asserts that several incumbent LECs, such as NYNEX and Bell Atlantic, have made this form of transport available.[29]

11. Ameritech argues that the network element "interoffice transport" must be unbundled from switching and must be a discrete facility or piece of equipment used in the provision of telecommunications services.[30] Ameritech contends that the Commission's requirement to provide unbundled shared interoffice facilities means that requesting carriers have the option of sharing

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[27] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Jan. 28, 1997 (AT&T Jan. 28 *Ex Parte*). *...iting Local Competition Order*, 11 FCC Rcd at 15633, 15631, paras. 262, 258; Letter from Leonard S. Sawicki, Director FCC Affairs, MCI, to William F. Caton, Acting Secretary, FCC, June 17, 1997 (MCI June 17 *Ex Parte*).

[28] AT&T Jan. 28 *Ex Parte*.

[29] Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, Apr. 16, 1997 (WorldCom Apr. 16 *Ex Parte*).

[30] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, May 23, 1997 (Ameritech May 23 *Ex Parte*). *See also* Letter from Cyndie Eby, Executive Director - Federal Regulatory, US West, Inc., to William F. Caton, Acting Secretary, FCC, Feb. 27, 1997 (US West Feb. 27 *Ex Parte*) (a network element is a facility that is dedicated to the exclusive use of a lawful interconnector).

dedicated interoffice facilities by subdividing those facilities among themselves, but that requesting carriers do not have the right to share the links used to transport Ameritech's own traffic.[31] Ameritech claims that unbundled transport can be provided in two ways: (1) dedicated transport, which is a discrete network element used exclusively by a single carrier and billed to that carrier; and (2) shared transport, which is a discrete network element jointly used by two or more requesting carriers, with the bill being pro-rated as directed by sharers.[32] Ameritech contends that, although requesting carriers may have the option of combining unbundled network elements, the definition of the term "network element" requires that the element must be able to be used separate from the rest of the incumbent LEC's network or facilities.[33]

12. Several incumbent LECs argue that the competitive carriers' definition of shared transport is inconsistent with the definition of an unbundled network element. Ameritech and BellSouth argue that shared transport, as proposed by competitive carriers, constitutes a service rather than an unbundled element.[34] According to Ameritech, such a definition bundles two elements -- transport and switching.[35] Ameritech also argues that the competitive carriers' position is contrary to the basic concept of unbundled network elements because unbundled elements are billed on a per facility/per month basis, which is consistent with the purchase of facilities as opposed to services.[36] Ameritech contends

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[31] Ameritech Opposition at 8-9.

[32] Ameritech Jan. 28 *Ex Parte*.

[33] Ameritech Opposition at 7-8.

[34] Ameritech Opposition at 7; BellSouth Opposition at 5. *See also* Bell Atlantic Opposition at 20 (the Commission's unbundled rules require services to be unbundled into separate network elements).

[35] Ameritech Opposition at 7.

[36] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Feb. 3, 1997 (Ameritech Feb. 3 *Ex Parte*).

that competitive LECs are requesting "common transport" service rather than the network element "shared transport." Ameritech claims that the term "common transport" is used to describe basic network connectivity, where incumbent LECs are responsible for transporting the call to the destination. Ameritech contends that it is currently offering "common transport" service as switched access service and wholesale usage service. Ameritech argues that these services are not network elements; rather, the switched access and wholesale usage services use many separate components of the existing public switched network in combination. Ameritech claims that "common transport" is thus inextricably intertwined with switching, and is not "transport unbundled from switching."[37] Ameritech also argues that the Commission's rules applicable to the provision of unbundled switching only require that incumbent LECs offer the features "the switch is capable of providing."[38] Ameritech claims that the switch does not include the routing instructions, which are a proprietary product of Ameritech, and are not a feature of the switch.[39]

13. Ameritech contends that competitive LECs are trying to "game" the statutory pricing scheme by attempting to purchase minutes of use of Ameritech's entire network, as opposed to a specific transport facility within the network. According to Ameritech, competitive carriers would thus be able to purchase unbundled elements while avoiding the concomitant risk that the leased facility will be underutilized. This, according to Ameritech, is contrary to the FCC's intent.[40] Bell Atlantic contends that

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[37] Ameritech Jan. 28 *Ex Parte*.

[38] Letter From James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, May 9, 1997 (Ameritech May 9 *Ex Parte*) attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 6-7 (Gebhardt Supplemental Rebuttal Testimony).

[39] Gebhardt Supplemental Rebuttal Testimony at 6.

[40] Ameritech Feb. 3 *Ex Parte*, *citing Local Competition Order*, FCC Rcd at 15668-69, para. 334. *See also* Ameritech Opposition at 7-8 (citing the Commission's statement that carriers purchasing network

WorldCom is requesting a single usage-sensitive rate for both dedicated and tandem switched transport. Bell Atlantic opposes this request on the ground that it seeks reinstatement of the "equal charge per unit of traffic" rule[41] that the Commission abandoned years ago.[42] BellSouth claims that per minute-of-use pricing for shared transport would be inconsistent with the 1996 Act because, pursuant to Section 252(d)(1), pricing for an unbundled element shall be "based on the cost . . . of providing" the element.[43] BellSouth contends that the "common" transport option that WorldCom requests would consist of "common" transport between an incumbent LEC's local end office and tandem plus dedicated transport between the incumbent LEC's tandems and the serving wire center. BellSouth argues that the costs of the dedicated

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elements by definition face a greater risk than a reseller but under WorldCom's proposal, requesting carriers assume no additional risk).

[41] The "equal charge per unit of traffic rule" was established in the Modification of Final Judgment (MFJ) in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *affirmed sub. nom., Maryland v. United States*, 103 S. Ct. 1240 (1983). The rule required that until Sept. 1, 1991:

> Charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers.

MFJ, Appendix B, Section B.

[42] Bell Atlantic Opposition at 20; Bell Atlantic Reply at 10. Bell Atlantic claims, however, that, if WorldCom seeks merely to route *local calls* made by customers of competitive carriers that purchase unbundled switching over the incumbent's network in common with local calls made by customers of the incumbent, then Bell Atlantic is willing to provide such transport and will route competitive carrier's local calls between offices exactly the way Bell Atlantic routes its own local calls. Bell Atlantic Reply at 10.

[43] BellSouth Reply at 6, *citing* 47 U.S.C. § 252(d)(1).

transport are not usage-sensitive.[44] In addition, several incumbent LECs object to WorldCom's petition on the ground that it would enable requesting carriers, in effect, to obtain access service without having to pay access charges.[45]

14. AT&T contends that Ameritech's proposal for "shared transport" is merely dedicated transport with a billing option that would enable carriers to resell portions of the dedicated transport and have Ameritech act as the billing agent.[46] AT&T argues that shared transport, as defined by Ameritech, would not provide a viable transport option for competitive carriers. AT&T claims that competitive carriers cannot properly engineer a transport network because they do not have access to data about existing traffic patterns and levels. Consequently, AT&T alleges that, under Ameritech's shared transport proposal, competitive carriers will be forced to route their traffic to tandems even when it would be more efficient to route such traffic directly to end offices. AT&T claims that this will lead to poor utilization of incumbent LEC interoffice transport facilities and will require the inefficient deployment of additional transport facilities between incumbent LEC end offices and the tandems.[47] AT&T also argues that usage sensitive pricing for shared use of interoffice transport facilities is consistent with other network elements such as unbundled switching, tandem switching, signalling, and call related databases, which are either partly or entirely priced on a per minute-of-use or per query basis.[48] In contrast to Ameritech's position regarding the routing table, NYNEX claims that the shared transport

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[44] BellSouth Reply at 6.

[45] Ameritech Opposition at 7; USTA Opposition at 16-17; LECC Reply at 9.

[46] AT&T Jan. 28 *Ex Parte*.

[47] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Dec. 12, 1996 (AT&T Dec. 12 *Ex Parte*).

[48] AT&T Jan. 28 *Ex Parte*. *See also* WorldCom May 21 *Ex Parte*.

unbundled element being offered by NYNEX allows competing carriers to use the same end office routing tables and functions that are used by NYNEX to route its own traffic.[49] Also, WorldCom claims that, when a carrier purchases unbundled local switching, it purchases all "features and functions, including functions integral to call routing" including the routing table.[50]

15. MCI and AT&T assert that the per minute-of-use option for shared transport is critical when providing local exchange service via unbundled local switching.[51] AT&T states that the Commission, in the *Local Competition Order*, recognized that the unbundling requirements of the 1996 Act provided competitive carriers with the opportunity to share the economies of scale and scope of the incumbent LEC. AT&T contends that access to shared transport on a cost-based, per minute-of-use basis is critical to preserving such scale and scope economies for competitive carriers.[52] MCI claims that competing carriers will need access to unbundled local switching and shared transport in less densely

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[49] Letter from G. R. Evans, Vice President Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, FCC, July 18, 1997 (NYNEX July 18 *Ex parte*).

[50] Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, May 21, 1997 (WorldCom May 21 *Ex parte*) attaching Surrebuttal Testimony of Joseph Gillan at 16. (Gillan Surrebuttal Testimony). *See also* WorldCom Opposition at 3 (shared transport is necessary to permit a requesting carrier using the local switching element to use the same routing options for its local traffic that the incumbent LEC uses for its own traffic).

[51] MCI June 17 *Ex Parte*; AT&T Jan. 25 *Ex Parte*.

[52] AT&T Jan. 28 *Ex Parte*, *citing Local Competition Order*, 11 FCC Rcd at 15508-09, para. 11 ("incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly . . . [t]he local competition provisions of the [1996] Act require that these economies be shared with entrants"); *Id.* at 15624, para. 242 ("National requirements for unbundled elements will allow new entrants . . . seeking to enter local markets on a national or regional scale to take advantage of economies of scale in the network design").

populated areas, because they are likely to build their own facilities early on only in urban centers. MCI contends that transport thus needs to be priced on a per minute-of-use basis because, in less densely populated areas, new entrants may have insufficient customer volume to justify flat-rated, dedicated transport.[53] MCI notes that other incumbent LECs, including NYNEX and BellSouth, are offering shared transport on a per minute-of-use basis.[54] MCI further notes that Ameritech's proposed non-recurring charges associated with Ameritech's shared and dedicated transport make the use of flat-rated shared and dedicated facilities even more uneconomic.[55] MCI contends that in Illinois Ameritech, in connection with its unbundled local switching proposal, is attempting to impose monthly trunk port charges of $147.56 for each digital trunk port and a nonrecurring charge of $729.39 for each trunk port. MCI claims that, if Ameritech is successful in forcing new entrants to use dedicated trunking in connection with unbundled local switching at these rates, there is little likelihood that use of unbundled local switching will be a viable entry strategy where traffic volumes do not justify flat-rated transport.[56]

16. AT&T and WorldCom also argue that, contrary to Ameritech's contention, defining shared transport consistent with the competitive carriers' interpretation would not eliminate the difference between resale and unbundled elements.[57] AT&T claims

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[53] MCI June 17 *Ex Parte*. AT&T claims that competitive carriers will not have the volume of traffic to justify purchasing dedicated transport. Letter from Judy Argentieri, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Jan. 6, 1997 (AT&T Jan. 6 *Ex Parte*). *Accord* WorldCom Apr. 16 *Ex Parte*; CompTel Opposition at 2-3 (a usage option for tandem-switched transport is necessary to prevent harmful discrimination against new entrants who must rely upon tandem-switched transport compared with larger carriers whose traffic volumes justify purchasing dedicated transport).

[54] MCI June 17 *Ex Parte*.

[55] MCI June 17 *Ex Parte*.

[56] MCI June 17 *Ex Parte*.

[57] Letter from Bruce K. Cox, Government Affairs Director,

that the Commission, in the *Local Competition Order*, identified three differences between the purchase of unbundled elements and resale, and all three differences continue to be valid.[58]

17. WorldCom contends that the Act and the Commission's rules make clear that the requesting carrier, purchasing unbundled local switching, is the sole provider of the local switching portion of interexchange access, regardless of the method of transport chosen by the interexchange carrier (IXC) to reach the unbundled local switch.[59] WorldCom suggests that NYNEX and Bell Atlantic do not contest this.[60] AT&T contends that, when a requesting carrier purchases the unbundled local switch and the unbundled

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AT&T, to William F. Caton, Acting Secretary, FCC, May 14, 1996 (AT&T May 14 *Ex Parte*); Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, May 23, 1997 (WorldCom May 23 *Ex parte*).

[58] AT&T May 14 *Ex Parte*. First, according to AT&T, network element purchasers bear the risk if elements, such as the loop and the switch, are not profitably utilized by customers. Carriers purchasing end-to-end rebundled unbundled elements face the risk that their users will generate substantial switch usage costs on local calls (free usage), without generating significant interLATA traffic and associated revenue. Second, competitive carriers buying the end-to-end unbundled elements can use their elements to create services the incumbent does not offer, and thus increase competitive options to consumers. Finally, use of rebundled unbundled network elements fosters the growth of facilities-based competition because competitors can gradually introduce their own facilities in place of elements purchased from incumbents. AT&T contends that most large competitive carriers would prefer to own their own networks because it reduces their vulnerability to discrimination by the incumbent, and gives them greater control over their costs, network quality, and ability to provide new services in response to consumer demand. *Id*. *See also* WorldCom May 23 *Ex Parte* (combinations of network elements provide new entrants an entirely different competitive entry strategy than resale. Such combinations of network elements permit new entrants the opportunity to provide new service and price pressures on incumbent LECs).

[59] WorldCom Apr. 16 *Ex Parte*.

[60] WorldCom Apr. 16 *Ex Parte*.

loop, that requesting carrier is entitled to bill an IXC for the access services associated with those unbundled network elements when the competitive carrier's local customer initiates or receives an interexchange call carried by that IXC. AT&T also claims that the requesting carrier has the right to offer transport services to the IXC; it is, however, the IXC's decision as to which carrier it uses to provide access transport services.[61]

18. Responding to LECC's petition, WorldCom argues that, by tying the provision of shared transmission facilities to both local switching and tandem capabilities, the clarification sought by LECC is overbroad and would unnecessarily constrain the ability of requesting carriers to purchase access to shared transmission facilities between two end offices as a network element.[62] WorldCom further contends that such a transport regime would require that each requesting carrier that purchases dedicated trunks between end offices establish customized routing using new line class codes. According to WorldCom, this would lead to rapid line class code exhaustion.[63]

III. DISCUSSION

19. On July 18, 1997, the United States Court of Appeals for the Eighth Circuit affirmed in part and vacated in part the Commission's *Local Competition Order*. We note, as a predicate to our discussion below, that the court affirmed the Commission's rulemaking authority to identify unbundled network elements. The court held that section 251(d)(2) of the Act expressly gave the

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[61] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, filed July 11, 1997.

[62] WorldCom Opposition at 3-5 (network cost and efficiency of both the incumbent and the requesting carrier would suffer because additional and unnecessary dedicated trunk groups would have to be created, raising the costs for competitors, and the incumbent's own trunk groups would operate less efficiently as new entrant's traffic is removed from trunk groups already sized to handle this traffic load).

[63] WorldCom Opposition at 5.

Commission jurisdiction in this area.[64] We thus conclude that the Commission has authority to address, in this reconsideration order, the issues raised by petitioners concerning the extent to which "shared transport" should be provided as an unbundled element.

20. WorldCom filed a petition for clarification, and LECC filed a petition for reconsideration of the *Local Competition Order*; both petitions concerned the definition of shared transport as an unbundled network element. WorldCom filed a petition for clarification pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, which set forth rules regarding petitions for reconsideration. In its petition WorldCom also stated that, "[s]hould the Commission not regard this petition as a request for clarification of the *Local Competition Order*, WorldCom requests that it be regarded as a petition for reconsideration."[65] We believe WorldCom's filing is more properly addressed as a petition for reconsideration, and treat it as such in this decision.

21. Parties disagree about what we required in the *Local Competition Order* with respect to shared transport. In addition, parties ask us to clarify or reconsider our decision regarding the provision of shared transport under section 251(c)(3). We first restate what we required in the *Local Competition Order*, and then reconsider certain aspects that may have been unclear or that were not addressed in the *Local Competition Order*. We then respond to arguments raised by parties that advocate a different approach to the provision of shared transport than our rules require.

22. We believe that the petitions for reconsideration have raised reasonable questions about the scope and nature of an incumbent LEC's obligation to offer shared transport as an unbundled network element, pursuant to section 251(c)(3) and our implementing regulations. We address these issues below. We also believe, however, some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the *Local Competition Order*, we expressly required incumbent LECs to provide access

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[64] *Iowa Utilities Bd.* at *32, n.10.

[65] WorldCom Petition at 1, fn 1.

to transport facilities "shared by more than one customer or carrier."[66] The term "carrier" includes both an incumbent LEC as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the *Local Competition Order* encompasses a facility that is shared by multiple carriers, including the incumbent LEC. We recognize that the *Local Competition Order* did not explicitly state that an incumbent LEC must provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same facilities that an incumbent LEC uses for its traffic. We find, however, that a fair reading of our order and rules does not support the claim advanced by Ameritech that a shared network element necessarily is shared only among competitive carriers and is separate from the facility used by the incumbent LEC for its own traffic. Indeed, only Ameritech and US West suggest that the *Local Competition Order* could be interpreted to require sharing only between multiple competitive carriers.[67] Moreover, the fact that we required incumbent LECs to provide access to other network elements, such as signalling, databases, and the local switch, which are shared among requesting carriers and incumbent LECs is consistent with our view that transport facilities "shared by more than one customer or carrier" must be shared between the incumbent LECs and requesting carriers. Furthermore, with respect to local switching, we expressly rejected, in the *Local Competition Order*, a proposal that incumbent LECs could, or were required to, partition local switches before providing requesting carriers access to incumbent LEC switches under section 251(c)(3). We stated that "[t]he requirements we establish for local switch unbundling do not entail physical division of the switch, and consequently do not impose the inefficiency or technical difficulties identified by some commentators."[68] We thus required that shared portions of incumbent LEC switches would be shared by all carriers, including the incumbent LEC. Although we do not believe that the *Local*

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[66] 47 C.F.R. § 51.319(d)(2)(i).

[67] *See* Ameritech Jan. 28. *Ex Parte*; US West Feb. 27 *Ex Parte*.

[68] *Local Competition Order*, 11 FCC Rcd at 15708, para. 416.

Competition Order was unclear as to this aspect of an incumbent LEC's obligation to provide shared transport, we take this opportunity to state explicitly that the *Local Competition Order* requires incumbent LECs to offer requesting carriers access, on a shared basis, to the same interoffice transport facilities that the incumbent uses for its own traffic.

23. We also conclude that the *Local Competition Order* was not ambiguous as to an incumbent LEC's obligation to offer access to the routing table resident in the local switch to requesting carriers that purchase access to the unbundled local switch.[69] The *Local Competition Order* made clear that requesting carriers that purchase access to the unbundled local switch may obtain customized routing, unless it is not technically feasible to provide customized routing from that switch. In those instances, a requesting carrier is limited to using the routing instructions in the incumbent LEC's routing table.[70] In so holding, we necessarily accepted the view that requesting carriers that take unbundled local switching have access to the incumbent LEC's routing table, resident in the switch. We find nothing in the *Local Competition Order* that supports the contention that requesting carriers that obtain access to unbundled local switching, pursuant to section 251(c)(3), do not obtain access to the routing table in the unbundled local switch.

24. The *Local Competition Order* did not clearly define certain aspects of incumbent LECs' obligation to provide access to shared transport under section 251(c)(3). In particular, we did not clearly and unambiguously (1) identify all portions of the network to which incumbent LEC must provide interoffice transport facilities on a shared basis; and (2) address whether requesting carriers may use shared transport facilities to provide exchange

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[69] Both end office and tandem switches contain routing tables, which provide information about how to route each call. The routing instructions notify the switch as to which trunks are to be used in transporting a call. Depending upon the availability of circuits, a call may be routed directly from the end office of the calling party to the called party's end office, or routed through a tandem switch.

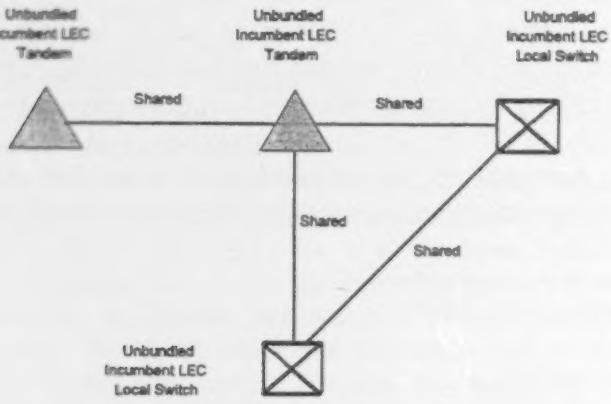
[70] *Local Competition Order*, 11 FCC Rcd at 15706, para. 412.

access service to IXCs for access to customers to whom they also provide local exchange service. We do so here on reconsideration.

A. Incumbent LECs' obligation regarding shared transport

25. We conclude that the obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and tandem. Thus, incumbent LECs are required to provide shared transport between end offices, between tandems, and between tandems and end offices).[71]

Diagram 1



26. The *Local Competition Order* expressly required "incumbent LECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch."[72] Parties disagree, however, about whether incumbent

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[71] *See* Diagram 1.

[72] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440. The Commission also stated in its rules that shared transmission facilities must be made available between "tandem switches and end offices." 47

LECs are required to provide shared transport between end offices. As noted above,[73] there is a discrepancy between the rule that establishes the general obligation to provide shared transport as a network element, and the rule vacated by the court that purports to establish the pricing standard for shared transport.[74] To the extent that incumbent LECs already have transport facilities between end offices, and between tandems, the routing table contained in the switch most likely would route calls between such switches.[75] We therefore conclude that there is no basis for limiting the use of shared transport facilities to links between end office switches and tandem switches. Limiting the definition of shared transport in this manner would not permit requesting carriers to utilize the routing tables in the incumbent LECs' switches. To the contrary, such a limitation effectively would require a requesting carrier to design its own customized routing table, in order to avoid having its traffic transported over the same interoffice facilities, connecting end offices, that the incumbent LEC use to transport its own interoffice traffic. Moreover, in the *Local Competition Order*, we held that it is technically feasible to provide access to interoffice transport facilities between end offices and between end offices and tandem switches.[76] No new evidence has been presented in this proceeding to convince us that our earlier conclusion regarding technical feasibility was incorrect.[77]

C.F.R. § 51.509(d).

[73] *See supra* para. 9.

[74] 47 C.F.R. §§ 51.319(d) and 51.509(d). We note that the Eighth Circuit has held that the Commission lacked jurisdiction to adopt the pricing standard set forth in section 51.509(d), and accordingly vacated that section of the Commission's rules.

[75] In fact, incumbent LECs would have to *modify* their routing tables in order to prevent calls from being routed between end offices or between tandems.

[76] *Local Competition Order*, 11 FCC Rcd at 15719, paras. 442 and 443.

[77] Among incumbent LECs, only Ameritech, in various *ex parte*

27. We further clarify in this order that incumbent LECs are only required to offer *dedicated* transport between their switches, or serving wire centers, and requesting carriers' switches. Our *Local Competition Order* was not absolutely clear as to whether incumbent LECs must provide dedicated or shared interoffice transport between incumbent LEC switches, or serving wire centers, and switches owned by requesting carriers. In the *Local Competition Order*, we required incumbent LECs to "provide access to *dedicated transmission facilities* between LEC central

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submissions, asserts that its switches are unable to "provide precise usage data or originating carrier identity for terminating local usage, or to identify terminating access usage with the called number." In essence, Ameritech contends that it is unable to accurately bill for the use of shared transport, including exchange access. Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, July 15, 1997 (Ameritech July 15 *Ex Parte*) attaching Reply Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan at 22-23 (Ameritech 271 Michigan Application Reply). As we held in our *Local Competition Order*, however, a determination of technical feasibility does not include consideration of billing concerns. 47 C.F.R. §51.5. *Accord Iowa Utilities Bd.* at *21. Moreover, as noted above, Ameritech is the only party to contend that it is not currently able to measure and bill for shared transport. In contrast, Bell Atlantic, NYNEX, and PacTel have stated that they offer shared transport in conjunction with unbundled local switching. Letter from Patricia E. Koch, Assistent Vice President - Government Relations - FCC, Bell Atlantic, to William F. Caton, Acting Secretary, FCC, August 4, 1997. Letter from G.R. Evans, Vice President Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, FCC, July 18, 1997; Letter from M.E. Garber, Senior Counsel, Pacific Telesis, to William F. Caton, Acting Secretary, FCC, Mar. 3, 1997. In any event, we note that Ameritech has stated in another proceeding that it has proposed a settlement mechanism as an interim solution until it develops a long-term solution. Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 22. Ameritech has also stated that it "is operationally capable of furnishing the 'platform' (unbundled local switching and shared transport) upon request." Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 23. We thus find no evidence that it is not technically feasible to provide shared transport.

offices or between end offices and those of competing carriers."[78] This could be read to suggest that incumbent LECs are only required to provide dedicated (but not shared) interoffice transport facilities between their end offices, or serving wire centers, and points in the requesting carrier's network. The rule that defines interoffice transmission facilities, however, is less clear, and could be read to require incumbent LECs to provide shared transport between incumbent LECs' switches, or serving wire centers, and requesting carriers' switches.[79]

28. We therefore clarify here that incumbent LECs must offer only *dedicated transport*, and not shared transport, between their switches, or serving wire centers, and requesting carriers' switches, as set forth in the *Local Competition Order*. We also note that the *Local Competition Order* expressly limited the requirement to provide unbundled interoffice transport facilities to *existing* incumbent LEC facilities.[80]

29. On reconsideration, we further clarify that incumbent LECs are not required to provide shared transport between incumbent LEC switches and serving wire centers.[81] We stated

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[78] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440 (emphasis added).

[79] 47 C.F.R. 51.319(d)(1) states:

> Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

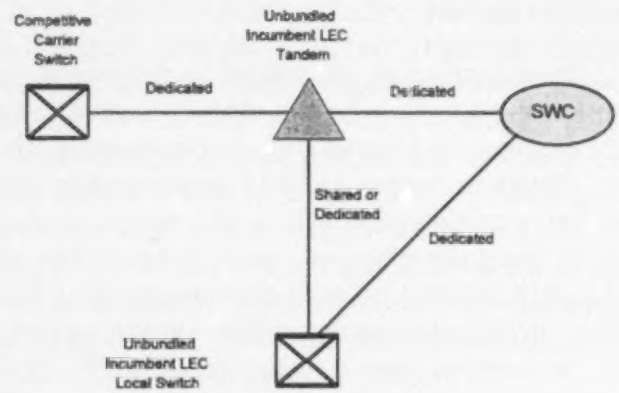
47 C.F.R. 51.319(d)(1).

[80] *Local Competition Order*, 11 FCC Rcd at 15722, para. 451.

[81] We note that this clarification finds some support in the *Local Competition Order*, where we concluded that: "[t]his requirement [that incumbent LECs provide access to dedicated transmission facilities]

above that shared transport must be provided between incumbent LEC switches. Serving wire centers are merely points of demarcation in the incumbent LEC's network, and are not points at which traffic is switched. Traffic routed to a serving wire center is traffic dedicated to a particular carrier. We thus conclude that unbundled access to the transport links between incumbent LEC switches and serving wire centers must only be provided by incumbent LECs on a *dedicated* basis.[82]

Diagram 2



30. Finally, we note that, traditionally, shared facilities are priced on a usage-sensitive basis, and dedicated facilities are priced on a flat-rated basis. We believe that this usage-sensitive pricing mechanism provides a reasonable and fair allocation of cost between the users of shared transport facilities. For example, in the *Access Charge Reform Order*, specifically the sections dealing with rate structure issues for interstate access charges, we required that the cost of switching, a shared facility, be recovered on a per

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includes, at a minimum, interoffice facilities between end offices and serving wire centers . . ." *Local Competition Order* at 15718, para 440.

[82] *See* Diagram 2.

minute of use basis, while the cost of entrance facilities, which are dedicated to a single interexchange carrier, be recovered on a flat-rated basis.[83] We note that several state commissions, in proceedings conducted pursuant to section 252 of the Act, have required incumbent LECs to offer shared transport priced on a usage-sensitive basis.[84] We acknowledge that, under the Eighth Circuit's decision, we may not establish pricing rules for shared transport. However, in situations where the Commission is required to arbitrate interconnection agreements pursuant to subsection 252(e)(5), we intend to establish usage-sensitive rates for recovery of shared transport costs unless parties demonstrate otherwise.[85]

B. Application of the requirements of section 251(d)(2) to shared transport

31. Shared transport, as defined in this order, satisfies the two-prong test set forth in section 251(d)(2) of the Act. Section 251(d)(2) requires the Commission, in determining what network elements should be made available under section 251(c)(3), to consider "at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[86] In the *Local Competition Order*, we held that an incumbent could refuse to

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[83] Access Charge Reform, First Report and Order, CC Docket 96-262, FCC 97-158 (rel. May, 16, 1997) (*Access Charge Reform Order*) at paras. 135, 153.

[84] *See, e.g.*, Michigan Public Service Commission, Case No. U-11280, July 14, 1997, Order at 26; Public Service Commission of Wisconsin, Case No. 6720-TI-120, Findings of Fact, Conclusions of Law, and Second Order, May 30, 1997.

[85] *See* 47 U.S.C. § 252(e)(5). *See also Local Competition Order*, 11 FCC Rcd at 16127-32, paras. 1283-95 (giving notice of certain minimum procedural rules and substantive standards that the Commission will use if it assumes jurisdiction pursuant to section 252(e)(5)).

[86] 47 U.S.C. § 251(d)(2).

provide access to a network element pursuant to section 251(d)(2) only if the incumbent LEC demonstrated that "the element is proprietary and that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the incumbent LEC's network to provide service."[87] We further held that, under section 251(d)(2)(B), we must consider "whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[88] The Eighth Circuit affirmed the Commission's interpretation of section 251(d)(2).[89]

32. In the *Local Competition Order*, we concluded that, with respect to transport facilities, "the record provides no basis for withholding these facilities from competitors based on proprietary considerations."[90] We also concluded that section 251(d)(2)(B) requires incumbent LECs to provide access to shared interoffice facilities and dedicated interoffice facilities.[91] With respect to the unbundled local switch, we held that, even assuming that switching may be proprietary, at least in some respects, "access to unbundled local switching is clearly 'necessary' under our interpretation of section 251(d)(2)(A)."[92] We also concluded that a requesting

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[87] *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. *See also id.* at 15642, para. 283.

[88] *Local Competition Order*, 11 FCC Rcd at 15643, para. 285.

[89] *Iowa Utilities Bd. v. FCC*, at *22-24.

[90] *Local Competition Order*, 11 FCC Rcd at 15720, para. 446.

[91] *Local Competition Order*, 11 FCC Rcd at 15720-21, para. 447.

[92] *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. In the *Local Competition Order*, we defined "necessary" in this specific context as meaning "that an element is a prerequisite for competition." *Id.* at para. 282. We also note that the Eighth Circuit affirmed this definition. *Iowa Utilities Bd.* at *22-23.

carrier's ability to offer local exchange service would be "impaired, if not thwarted," without access to the unbundled local switch, and therefore, that section 251(d)(2)(B) requires incumbent LECs to provide access to the unbundled local switch.[93]

33. Upon reconsideration, we herein affirm that incumbent LECs are obligated under section 251(d)(2) to provide access to shared transport, as we here define it, as an unbundled network element. Parties in the record have not contended that interoffice transport facilities are proprietary, and we have no basis for modifying our prior conclusion that interoffice transport facilities are not proprietary. Thus, there is no basis under section 251(d)(2)(A) for incumbent LECs to refuse to provide interoffice transport facilities on a shared as well as a dedicated basis.

34. We also note that the failure of an incumbent LEC to provide access to all of its interoffice transport facilities on a shared basis would significantly increase the requesting carriers' costs of providing local exchange service and thus reduce competitive entry into the local exchange market. In the *Local Competition Order*, we observed that:

> By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase *all* interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities.[94]

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[93] *Local Competition Order*, 11 FCC Rcd at 15710-11, para. 420.

[94] *Local Competition Order*, 11 FCC Rcd at 15718-19, para. 441 (emphasis added).

We continue to find the foregoing statements to be true with respect to shared as well as dedicated transport facilities. Requesting carriers should have the opportunity to use *all* of the incumbent LEC's interoffice transport facilities. Moreover, the opportunity to purchase transport facilities on a shared basis, rather than exclusively on a dedicated basis, will decrease the costs of entry.

35. We believe that access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns. Moreover, requiring competitive carriers to use dedicated transport facilities during the initial stages of competition would create a significant barrier to entry because dedicated transport is not economically feasible at low penetration rates. In addition, new entrants would be hindered by significant transaction costs if they were required to continually reconfigure the unbundled transport elements as they acquired customers. We note that incumbent LECs have significant economies of scope, scale, and density in providing transport facilities. Requiring transport facilities to be made available on a shared basis will assure that such economies are passed on to competitive carriers. Further, if new entrants were forced to rely on dedicated transport facilities, even at the earliest stages of competitive entry, they would almost inevitably miscalculate the capacity or routing patterns. We recognize, however, that the need for access to all of the incumbent LEC's interoffice facilities on a shared basis may decrease as competitive carriers expand their customer base and have an opportunity to identify traffic volumes and call routing patterns. We therefore may revisit at a later date whether incumbent LECs continue to have an obligation, under section 251(d)(2), to provide access to all of their interoffice transmission facilities on a shared, usage sensitive basis.[95]

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[95] We note that, if, in the future, competitive carriers gain sufficient market penetration to justify obtaining dedicated transport facilities, either through the use of unbundled elements or through building their facilities, shared transport may no longer meet the section 251(d)(2) requirements. In that event, the Commission can evaluate at that time whether incumbent LECs must continue to provide access to

36. As noted above, although interoffice transport, as we define the element pursuant to section 251(c)(3), refers to the transport links in the incumbent LEC's network, access to those links on a shared basis effectively requires a requesting carrier to utilize the routing table contained in the incumbent LEC's switch. Ameritech contends that the routing table contained in the switch, which is used in conjunction with shared transport, is proprietary. Ameritech and other incumbent LECs further allege that requesting carriers may obtain the functional equivalent of shared transport either by purchasing transport as an access service, or by purchasing dedicated transport facilities. These parties thus contend that, under section 251(d)(2)(A), incumbent LECs are not required to provide shared transport (including use of the routing table contained in the switch) as a network element.

37. Issues regarding intellectual property rights associated with network elements are before us in a separate proceeding.[96] For purposes of this Order only, we therefore assume without deciding that the routing table is proprietary. We nevertheless conclude that section 251(d)(2) requires an incumbent LEC to provide access to both its interoffice transmission facilities and to the routing tables contained in the incumbent LEC's switches.[97] We affirm our finding in the *Local Competition Order* that transport provided as part of access service, or as a wholesale usage service, is not a viable substitute for shared transport as a network element.[98] All incumbent LECs are not required to offer transport as an access service on a stand alone basis. Only Class A carriers are required, under our *Expanded Interconnection* rules,

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shared transport as a network element.

[96] *See* MCI Petition for Declaratory Ruling, CC Docket No. 96-98, CCB Pol. 97-4 (Mar. 11, 1997).

[97] The Eighth Circuit recognized that "the Act itself expressly contemplates that requesting carriers will have access to network elements that are proprietary in nature." *Iowa Utilities Bd.* at *32, n.37.

[98] *See Local Competition Order*, 11 FCC Rcd at 15721, para. 448.

to unbundle interstate transport service.[99] Moreover, transport service that incumbents offer under the *Expanded Interconnection* tariffs may include only interstate transport facilities (transport provided either via a tandem switch or direct trunked between a local switch and the serving wire center), not interoffice transport facilities directly connecting two local switches. In the *Local Competition Order*, moreover, we expressly rejected the suggestion that requesting carriers "are not impaired in their ability to provide a service . . . if they can provide the proposed service by purchasing the service at wholesale rates from a LEC."[100]

C. Use of shared transport facilities to provide exchange access service

38. In this order on reconsideration, we clarify that requesting carriers that take shared or dedicated transport as an unbundled network element may use such transport to provide interstate exchange access services to customers to whom it provides local exchange service. We further clarify that, where a requesting carrier provides interstate exchange access services to customers, to whom it also provides local exchange service, the requesting carrier is entitled to assess originating and terminating access charges to interexchange carriers, and it is not obligated to pay access charges to the incumbent LEC.

39. In the *Local Competition Order*, we held that, if a requesting carrier purchases access to a network element in order to provide local exchange service, the carrier may also use that element to provide exchange access and interexchange services.[101] We did not impose any restrictions on the types of

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[99] Class A carriers are those exchange carriers that have more than $100 million in total company regulated revenues. 47 C.F.R. §§ 32.11(a)(1), 32.9000.

[100] *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286. *See also id.* at 15644, para. 287. *See also Iowa Utilities Bd.* at *21 (stating that the fact that a capability may be available as a service does not necessarily preclude that capability from being available as a network element).

[101] *Local Competition Order*, 11 FCC Rcd at 15679, para. 356.

telecommunications services that could be provided over network elements. We did not specifically consider in the *Local Competition Order*, however, whether a requesting carrier may use interoffice transport to provide exchange access service. We conclude here that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.[102] We find that this is consistent with our initial decision.[103]

D. Response to Specific Arguments Raised by Parties

40. As discussed above, we define the unbundled network element of shared transport under section 251(c)(3) as interoffice transmission facilities, shared between the incumbent LEC and one or more requesting carriers or customers, that connect end office switches, end office switches and tandem switches, or tandem switches, in the incumbent LEC's network. We exclude from this definition interoffice transmission facilities that connect an incumbent LEC's switch and a requesting carrier's switch, and those connecting an incumbent LEC's end office switch, or tandem switch, and a serving wire center. This definition of shared transport assumes the interconnection point between the two carriers' networks, pursuant to section 251(c)(2), is at the incumbent LEC's switch. This definition is consistent with the statutory definition of network elements, which defines a network element as a facility or equipment used in the provision of a

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[102] We issue a further notice of proposed rulemaking below seeking comment on whether carriers may use dedicated and shared unbundled transport facilities to carry originating to, and terminating access traffic from, customer to whom the requesting carrier does not also provide local exchange service. *See infra* paras. 51-52.

[103] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15679, para. 356 (section 251(c)(3) permints interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services). *See also* NYNEX July 18 *Ex Parte* (recognizing that, when a requesting carrier "wins a local service customer," and uses an unbundled network element such as shared transport to serve that customer, that the carrier "is entitled to use that same element to provide other telecommunications services, such as exchange access, to IXCs.")

telecommunications service, including the features, functions, and capabilities provided by means of such facility or equipment.[104]

41. As an initial matter, we reject Ameritech's contention that, by definition, network elements must be partly or wholly dedicated to a customer.[105] To the contrary, we held in the *Local Competition Order* that some network elements, such as loops, are provided exclusively to one requesting carrier, and some network elements, such as interoffice transport provided on a shared basis, are provided on a minute-of-use basis and are shared with other carriers.[106] In the *Local Competition Order*, we also identified signalling, call-related databases, and the switch, as network elements that necessarily must be shared among the incumbent and multiple competing carriers.[107]

42. We also reject Ameritech's and BellSouth's contention that, because WorldCom and other requesting carriers seek access to an element -- shared transport -- that cannot be effectively disassociated from another element -- local switching, the requesting carriers are in fact seeking access to a bundled service rather than to transport as a network element unbundled from switching.[108] As previously discussed, several of the network elements we identified in the *Local Competition Order* depend, at least in part, on other network elements. In particular, although we identified the signalling network as a network element, the information necessary to utilize signalling networks resides in the switch, which we identified as a separate network element. In

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[104] 47 U.S.C. § 153(29).

[105] *See* Ameritech Reply at 19.

[106] *Local Competition Order*, 11 FCC Rcd at 15631, para. 258.

[107] *See* 47 C.F.R. § 51.319(e). *See also Iowa Utilities Bd.* at *18 (affirming determination that signalling and databases are network elements).

[108] *See* Ameritech Opposition at 7 and Bell South Reply at 6. Ameritech also contends that incumbent LECs are not required to provide bundled services at cost-based rates under section 251(c)(3) and section 252(d)(1). *See* Ameritech Opposition at 7.

addition, we required incumbent LECs, upon request, to provide access to unbundled loops conditioned to provide, among other things, digital services such as ISDN, even though the equipment used to provide ISDN service typically resides in the local switch, rather than in the loop.[109] We thus find no basis for concluding that each network element must be functionally independent of other network elements.

43. We reject as well Ameritech's contention that a network element must be identifiable as a limited or pre-identified portion of the network. We find nothing in the statutory definition of network elements that prohibits requesting telecommunications carriers from seeking access to every transport facility within the incumbent's network. Our definition of signalling as a network element does not require requesting carriers to identify in advance a particular portion of the incumbent LEC's signalling facilities, but instead permits requesting carriers to obtain access to multiple signalling links and signalling transfer points in the incumbent LEC's network on an as-needed basis.[110] We also reject Ameritech's assertion that shared transport cannot be physically separated from switching.[111] Both dedicated and shared transport facilities are transport links between switches. These links are physically distinct from the end office and tandem switches themselves.

44. Although we conclude that shared transport is physically severable from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier. Although, the Eighth Circuit struck down the Commission's rule that required incumbent LECs

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[109] *Local Competition Order*, 11 FCC Rcd at 15691, para. 380.

[110] *See generally Local Competition Order*, 11 FCC Rcd at 15738-41, paras. 479-483.

[111] *See* May 9, 1997 *ex parte* from Jim Smith, Director, Federal Relations, Ameritech, to William Caton, Acting Secretary, FCC, attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 2 (Gebhardt Supplemental Rebuttal Testimony).

to rebundle separate network elements,[112] the court nevertheless stated that it: "upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to . . . competing carriers."[113] Among other things, the court left in effect section 51.315(b) of the Commission's rules, which provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[114] Therefore, although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined, absent an affirmative request. In addition to violating section 51.315(b) of our rules, such dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit. We believe that such actions by an incumbent LEC would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled elements. Moreover, an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch because, by definition, the shared transport links are also used by the incumbent LEC to serve its customers. Thus, incumbent LECs would seem to have no network-related reason to separate network elements that it already combines absent a request.

45. We likewise reject Ameritech's contention that purchasing access to the switch as a network element does not entitle a carrier

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[112] *Iowa Utilities Bd.* at *25. *See also* 47 C.F.R. § 51.315(c)-(f) (vacated rules).

[113] *Iowa Utilities Bd.* at *28.

[114] 47 C.F.R. § 51.315(b).

to use the routing table located in that switch.[115] According to Ameritech, vendors provide switches that are capable of acting on routing instructions, but the switch itself does not include routing instructions; those instructions are added by the carrier after it purchases the switch from the vendor and are contained in a routing table resident in the switch. Ameritech asserts that its routing tables are proprietary products, and "are not a feature of the switch."[116] In the *Local Competition Order*, we determined that "we should not identify elements in rigid terms, but rather by function."[117] Routing is a critical and inseverable function of the local switch. One of the most essential features a switch performs is to provide routing information that sends a call to the appropriate destination. We find no support in the statute, the *Local Competition Order*, or our rules for Ameritech's assertion that the switch, as a network element, does not include access to the functionality provided by an incumbent LEC's routing table. In fact, the only question addressed in the *Local Competition Order* was whether requesting carriers could obtain *customized* routing, that is, routing different from the incumbent LEC's existing routing arrangements.[118]

46. We further find that access to unbundled switching is not necessarily limited to the product the incumbent LEC originally purchased from a vendor. As we noted in the *Local Competition Order*, incumbent LECs may in some instances be required to modify or condition a network element to accommodate a request under section 251(c)(3).[119] Moreover, we held that unbundled

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[115] Gebhardt Supplemental Rebuttal Testimony at 6-7.

[116] Gebhardt Supplemental Rebuttal Testimony at 6-7.

[117] *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

[118] *Local Competition Order*, 11 FCC Rcd at 15709, para. 418. We concluded that incumbent LECs must offer customized routing unless they prove to the state commission that doing so would not be technically feasible in a particular switch.

[119] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15692,

local switching includes access to the vertical features of the switch, regardless of whether the vertical features were included in the switch when it was purchased, or whether the vertical features were purchased separately from the vendor or developed by the incumbent.[120] We held that network elements include physical facilities "as well as logical features, functions, and capabilities that are provided by, *for example, software located in a physical facility such as a switch.*"[121] We also note that the Eighth Circuit affirmed the Commission's interpretation of the Act's definition of "network elements." The court stated that "the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B" and that the Act's definition explicitly made reference to "databases, signaling systems, and information sufficient for billing and collection."[122] Thus, just as databases and signaling systems may include software created by the incumbent LEC, which must be made available to competitive carriers purchasing those elements on an unbundled basis, we believe that the routing table created by the incumbent LEC that is resident in the switch must be made available to requesting carriers purchasing unbundled switching. Finally, we note that Ameritech is the only incumbent LEC that has argued in this record that the routing table is not included in the unbundled local switching element. Other incumbent LECs have stated that they offer shared transport in conjunction with unbundled local switching.[123] This suggests that other incumbent LECs recognize that the routing table is a feature, function, or capability of the switch.

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para. 382. This determination was specifically "endorsed" by the Eighth Circuit. *Iowa Utilities Bd.* at *32, n.33. *See also* 47 C.F.R. § 51.307.

[120] *See generally Local Competition Order*, 11 FCC Rcd at 15706, para. 412. *See also* 47 C.F.R. § 51.319(c)(1)(i)(C).

[121] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260 (emphasis added).

[122] *Iowa Utilities Bd.* at *20.

[123] *See* n.77 *supra*.

47. We also disagree with Ameritech's and BellSouth's argument that defining the unbundled network element shared transport as all transport links between any two incumbent LEC switches would be inconsistent with Congress's intention to distinguish between resale services and unbundled network elements. Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates; sections 251(c)(4) and 252(d)(3) require incumbent LECs to make available for resale, at retail price less avoided costs, services the incumbent LEC offers to retail users. In the *Local Competition Order*, we held that a key distinction between section 251(c)(3) and section 251(c)(4) is that a requesting carrier that obtains access to unbundled network elements faces greater risks than a requesting carrier that only offers services for resale.[124] A requesting carrier that takes a network element dedicated to that carrier, and recovered on a flat-rated basis, must pay for the cost of the entire element, regardless of whether the carrier has sufficient demand for the services that the element is able to provide. The carrier thus is not guaranteed that it will recoup the costs of the element. By contrast, a carrier that uses the resale provision will not bear the risk of paying for services for which it does not have customers.[125] In particular, a requesting carrier that takes an unbundled local switch must pay for all of the vertical features included in the switch, even if it is unable to sell those vertical features to end user customers.[126] Requesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein, and consequently will be forced to assume the risk associated with switching.[127]

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[124] *Local Competition Order*, 11 FCC Rcd at 15668-69, para. 334.

[125] *Iowa Utilities Bd.* at *26-27.

[126] *Local Competition Order*, 11 FCC Rcd at 15707-08, para. 414.

[127] A requesting carrier that uses its own self-provisioned local switches, rather than unbundled local switches obtained from an incumbent LEC, to provide local exchange and exchange access service

48. BellSouth's arguement, that assessing a usage-sensitive rate for shared transport would be inconsistent with the 1996 Act because it would not reflect the manner in which costs are incurred, is similarly unpersuasive. BellSouth's argument is premised on the assumption that incumbent LECs would be required to provide shared transport over facilities between the tandem switch and the serving wire center. In this order, however, we make clear that incumbent LECs are required to provide transport on a dedicated, but not on a shared basis, over transport facilities between the incumbent LEC's tandem and the serving wire center. Thus, BellSouth's concern is misplaced.

49. We also find that there is no element in the incumbent LEC's network that is an equivalent substitute for the routing table. We agree with Ameritech that requesting carriers could duplicate the shared transport network by purchasing dedicated facilities. But in that instance, requesting carriers would be forced to develop their own routing instructions, and would not be utilizing a portion of the incumbent LEC's network to substitute for the routing table. In the *Local Competition Order*, we specifically rejected the suggestion that an incumbent LEC is not required to provide a network element if a requesting carrier could obtain the element from a source other than the incumbent LEC.[128] The Eighth Circuit affirmed the Commission's conclusion.[129]

50. Furthermore, we find that, at this stage of competitive entry, limiting shared transport to dedicated transport facilities, as

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would use dedicated transport facilities to carry traffic between its network and the incumbent LEC's network. Thus, the only carrier that would need shared transport facilities would one that was using an unbundled local switch.

[128] *Local Competition Order*, 11 FCC Rcd at 15643-44, paras. 286-87. We found that requiring incumbent LECs to provide an element only where it is unavailable from any other source would nullify section 251(c)(3) because any new entrant, theoretically, could duplicate the incumbent LEC's entire network. Congress recognized that such duplication could delay entry and might be inefficient.

[129] *Iowa Utilities Bd.* at *22.

Ameritech suggests, would impose unnecessary costs on new entrants without any corresponding, direct benefits. AT&T and Ameritech have both presented evidence regarding the costs of dedicated transport facilities linking every end office and tandem in an incumbent LEC's network as significant relative to the cost of "shared transport." For example, AT&T contends that the cost is $.041767 per minute for dedicated transport plus associated non-recurring charges (NRCs).[130] AT&T claims that Ameritech would charge a total of $5008.58 per DS1 (including administrative charges and connection charges) and $58,552.87 per switch (including customized routing and billing development).[131] AT&T argues that this compares with $.000776 per minute for unbundled shared transport.[132] Ameritech, on the other hand, contends the use of tandem routed dedicated facilities cost is $.0031148 per minute plus associated NRCs.[133] Ameritech claims that the nonrecurring charges per DS1 are $2769.27 (including administrative charges per order). Ameritech states that other NRCs include two trunk port connection charges ($770.29 initial, $29.16 subsequent), service ordering charge per occasion ($398.72 initial, $17.37 subsequent), billing development charge per switch ($35,328.87), custom routing charge, per line class code per switch ($232.24), and a service order charge ($398.73).[134] Nevertheless, under either AT&T's or Ameritech's cost calculations for dedicated transport, we conclude that the relative costs of dedicated transport, including the associated NRCs, is an unnecessary barrier to entry for competing carriers.

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[130] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, March 20, 1997 (AT&T Mar. 20 *Ex Parte*).

[131] AT&T Mar. 20 *Ex Parte*.

[132] AT&T Mar. 20 *Ex Parte*.

[133] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Mar. 28, 1997 (Ameritech Mar. 28 *Ex Parte*).

[134] Ameritech Mar. 28 *Ex Parte*.

51. We also find that limiting shared transport to dedicated facilities, as defined by Ameritech, would be unduly burdensome for new entrants. First, we agree with MCI, AT&T, et al., that a new entrant may not have sufficient traffic volumes to justify the cost of dedicated transport facilities.[135] Second, a new entrant entering the local market with smaller traffic volumes would have to maintain greater excess capacity relative to the incumbent LEC in order to provide the same level of service quality (i.e., same level of successful call attempts) as the incumbent LEC.[136] As a new entrant gains market share and increased traffic volumes for local service, however, the relative amount of excess capacity necessary to prevent blocking should decrease. We do not rule out the possibility, therefore, that, once new entrants have had a fair opportunity to enter the market and compete, we might reconsider incumbent LECs' obligations to provide access to the routing table.[137]

52. As discussed above, requesting carriers may use shared transport to provide exchange access service to customers for whom they also provide local exchange service. Several competing carriers contend that an interexchange carrier (IXC) has the right to select a requesting carrier that has purchased unbundled shared

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[135] *See* n. 53 *supra*.

[136] *See* William W. Sharkey, *The Theory of Natural Monopoly* 184-85, (1982) ("that for a given number of circuits the economies [of scale] are more pronounced at higher grades of service (lower blocking probability). The economics of scale, however, decline substantially as the number of circuits increases. *Therefore for small demands a fragmentation of the network could result in a significant cost penalty, because more circuits would be required to maintain the same grade of service. At larger demands the costs of fragmentation are less pronounced.*") (emphasis added).

[137] As we held in the *Local Competition Order*, "the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by section 251(c)(3), but they do not require us to do so." *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286.

transport to provide exchange access service.[138] The carriers further contend that, if the IXC selects a requesting carrier, rather than the incumbent LEC, as the exchange access provider, the competing carrier is entitled to bill the IXC for the access services associated with shared transport. We find that a requesting carrier may use shared transport facilities to provide exchange access service to originate or terminate traffic to its local exchange customers, regardless of whether the requesting carrier or another carrier is the IXC for that traffic. We further conclude that a requesting carrier that provides exchange access service to another carrier is entitled to assess access charges associated with the shared transport facilities used to transport the traffic. We believe that this necessarily follows from our decision in the *Local Competition Order*[139] where we stated that:

> [W]here new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to IXCs because the new entrants, rather

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[138] Letter from Bruce D. Cox, Government Affairs Vice President for AT&T, to William F. Caton, Acting Secretary, FCC, July 11, 1997; WorldCom June 27 *Ex Parte*.

[139] In the *Local Competition Order*, we adopted a limited, transitional plan to address public policy concerns raised by the potential for requesting carriers to bypass access charges through the use of unbundled network elements. *See Local Competition Order* at 15862-69, paras. 716-32. Our authority to adopt that interim plan generally was upheld in *Competitive Telecommunications Association v. FCC*, although the court noted that the Commission lacks authority to decide whether carriers are obligated to continue to pay intrastate access charges. *Competitive Telecommunications Association v. FCC*, 1997 WL 352284 (8th Cir. June 27, 1997) at *6, n.5. Outside the scope of that transitional plan, however, we held that parties that use network elements to provide interexchange or exchange access services are not required to pay access charges. *Local Competition Order*, 11 FCC Rcd at 15682, para. 363; *Access Charge Reform Order* at paras. 339-340.

> than the incumbents, will be providing exchange access services . . . .[140]

We therefore find that requesting carriers that provide exchange access using shared transport facilities to originate and terminate local exchange calls may also use those same facilities to provide exchange access service to the same customers to whom the requesting carrier is providing local exchange service. Requesting carriers are then entitled to assess access charges to interexchange carriers that use the shared transport facilities to originate and terminate traffic to the requesting carrier's customers.

E. Final Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act (RFA),[141] the Commission issued a Final Regulatory Flexibility Analysis (FRFA) in its *Local Competition Order* in this proceeding.[142] None of the petitions for reconsideration filed in Docket No. 96-98 specifically address, or seek reconsideration of, that FRFA. This present Supplemental Final Regulatory Flexibility Analysis addresses the potential effect on small entities of the rules adopted pursuant to the *Third Order on Reconsideration* in this proceeding, *supra*. This Supplemental FRFA incorporates and adds to our FRFA.

54. *Need for and Objectives of this Third Order on Reconsideration and the Rules Adopted Herein.* The need for and objectives of the rules adopted in this *Third Order on Reconsideration* are the same as those discussed in the *Local Competition Order's* FRFA "Summary Analysis of Section V

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[140] *Local Competition Order*, 11 FCC Rcd at 15682, para. 363 n.772.

[141] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[142] *Local Competition Order*, 11 FCC Rcd at 16143-80, paras. 1324-441.

Access to Unbundled Network Elements."[143] In general, our rules adopted in Section V were intended to facilitate the statutory requirement that incumbent local exchange carriers (LECs) are required to provide nondiscriminatory access to unbundled network elements.[144] In this *Third Order on Reconsideration*, we grant in part and deny in part the petitions filed for reconsideration and/or clarification of the *Local Competition Order*, in order to further the same needs and objectives. We conclude that the duty of incumbent LECs to provide access to unbundled network elements also includes the provision of "shared transport" as an unbundled network element between end offices, even if tandem switching is not used to route the traffic. We also hold that the term "shared transport" refers to all transmission facilities connecting an incumbent LEC's switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. We conclude that incumbent LECs are obligated under Section 251(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(d)(2), to provide access to both their interoffice transmission facilities and their routing tables contained in the incumbent LEC's switches. Finally, we conclude that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.

55. *Description and Estimate of the Number of Small Entities To Which the Rules Will Apply*. In determining the small entities affected by our *Third Order on Reconsideration* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *Local Competition Order*.[145] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules we have adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern"

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[143] *Local Competition Order* at 16161, paras. 1374-1383.

[144] *Local Competition Order* at 16161, para. 1374.

[145] *See Local Competition Order* at 16149-57, paras. 1341-60.

under Section 3 of the Small Business Act.[146] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[147] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[148] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[149] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

56. In addition, for purposes of this Supplemental FRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *Local Competition Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service

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[146] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[147] 15 U.S.C. § 632.

[148] *Id.* (*citing* 13 C.F.R. § 121.201).

[149] *See Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

firms or small incumbent LECs that might be affected.[150] We further estimated that there are fewer than 1,347 small incumbent LECs that might be affected.[151] Finally, we estimated that there were fewer than 30 small entity CAPs that would qualify as small business concerns.[152]

57. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As a result of the rules adopted in the *Third Order on Reconsideration*, we require incumbent LECs to provide requesting carriers with access to the same shared transport for all transmission facilities connecting incumbent LECs' switches. No party to this proceeding has suggested that changes in the rules relating to access to unbundled network elements would affect small entities or small incumbent LECs. We determine that complying with this rule may require use of engineering, technical, operational, accounting, billing, and legal skills. For example, a new entrant may be required to combine its own interoffice facilities with those of the incumbent LEC, or be required to combine purchased unbundled network elements into a package unique to its own needs.

58. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[153] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *Local Competition Order*. As stated above, no petitioner has challenged this finding. We further find that our new rules, which clarify the definition of "shared transport," will

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[150] *Local Competition Order* at 16150, para. 1343.

[151] *Local Competition Order* at 16151, para. 1345.

[152] *Local Competition Order* at 16151, para. 1347.

[153] *Local Competition Order* at 16162, para 1376.

likely ensure that small entities obtain the unbundled elements that they request.

59. **Report to Congress**: The Commission will send a copy of the *Third Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Third Order on Reconsideration* and this supplemental FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Discussion

60. In the *Local Competition Order*, we did not condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer. We recognized, however, that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customers unless it offered local exchange service as well as exchange access service over those network elements. In particular, we found that local loops are dedicated to the premises of a particular customer.[154] Therefore, we stated that a requesting carrier would need to provide all services requested by the customer to whom the local loops are dedicated, and that, as a practical matter, requesting carriers usually would need to provide local exchange service over any unbundled local loops that it purchases under section 251(c)(3).[155] We similarly held in our *Order on Reconsideration* that the unbundled switch, as defined in the *Local Competition Order*, includes the line card, which is typically dedicated to a particular customer. We concluded that:

> Thus, a carrier that purchases the unbundled switching element to serve an end user effectively obtains the

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[154] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

[155] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

> exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user. A practical consequence of this determination is that the carrier that purchases the local switching element is likely to provide all available services requested by the customer served by that switching element, including switching for local exchange and exchange access.[156]

61. Neither of the petitions for reconsideration expressly asked the Commission to determine whether requesting carriers may purchase shared transport facilities under section 251(c)(3) of the Act to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.[157] Moreover, the oppositions and replies to the two petitions for reconsideration, as well as the *ex partes*, focused on the issue of whether requesting carriers may use unbundled shared transport facilities, in conjunction with unbundled switching, to compete in the local exchange market.[158] In fact, the issue of

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[156] *Order on Reconsideration*, 11 FCC Rcd at 13048, para. 11.

[157] *See, e.g.*, WorldCom Petition at 6 (new local entrants may need to use shared transport facilities between end offices as well as between an end office and a tandem); WorldCom Opposition at 4 (contending that requesting carriers that purchase unbundled local switching should be able to route calls over the same facilities the incumbent LEC uses to transport its traffic); LECC Petition at 33 ("the Order requires incumbent LECs to provide unbundled access to shared transmission facilities between end offices and tandem switches . . . [t]he Commission, however, should clarify that such shared transmission facilities may be provided to a requesting carrier only in conjunction with local switching and tandem capability).

[158] WorldCom April 16 *Ex Parte* (asserting that carriers that purchase unbundled local switching have the right to use incumbent LECs' interoffice transport facilities to complete local calls); AT&T Jan. 28 *Ex Parte* (noting that the Commission had held that carriers that seek to enter the local exchange market should be able to take advantage of the incumbent LEC's economies of scale); Bell Atlantic Reply at 10 (requesting carriers are entitled to purchase shared transport in conjunction with local switching to route local calls).

whether requesting carriers may purchase unbundled shared transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service was specifically addressed only in two recent *ex parte* submissions.[159] In order to develop a complete record on this issue, we issue this further notice of proposed rulemaking specifically asking whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service. Absent restrictions requiring carriers to provide local exchange service in order to purchase unbundled shared or dedicated transport facilities, an IXC, for example, could request shared or dedicated transport under section 251(c)(3) for purposes of carrying originating interstate toll traffic between an incumbent LEC's end office and the IXC's point of presence (POP). Likewise, an IXC could request such transport network elements for purposes of terminating interstate toll traffic from its POP to an incumbent LEC's end office. Parties that advocate the use of transport network elements for the transmission of such access traffic should address whether that approach is consistent with our *Order on Reconsideration* regarding the use of the unbundled local switching element to provide interstate access service[160] as well as recent appellate court decisions interpreting section 251(c)(2) and (3).[161] Parties that advocate restricting the use of transport network elements should address whether such restrictions are consistent with section 251(c)(3) of the Act, which requires an incumbent LEC to provide access to unbundled network elements "for the provision of a telecommunications service." Moreover, those parties should also address the technical feasibility of requiring an IXC to identify terminating toll traffic that is destined for customers that are not local exchange customers of the incumbent LEC.

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[159] WorldCom June 27 *Ex Parte*; NYNEX July 18 *Ex Parte*.

[160] *Order on Reconsideration*, 11 FCC Rcd at 13048-49, para. 12-13.

[161] *CompTel*, 11 F.3d at 1073-75; *Iowa Utilities Bd.* at n.20.

B. Procedural Matters

1. Ex Parte Presentations

62. This *Further Notice* is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[162]

2. Initial Regulatory Flexibility Analysis

63. As required by the Regulatory Flexibility Act (RFA),[163] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* (*Further Notice*). Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the remainder of the Further Notice, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with the RFA, 5 U.S.C. § 603(a).

64. *Need for and Objectives of the Proposed Rules*. We seek comment on whether requesting carriers may use unbundled shared transport facilities in conjunction with unbundled switching, to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service. We also seek comment on whether similar use restrictions may apply to the use of unbundled dedicated transport facilities. We propose no new rules at this time. In light of comments received in response to the *Further Notice*, we might issue new rules.

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[162] *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[163] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

65. *Legal Basis*. The legal basis for any action that may be taken pursuant to the Further Notice is contained in Sections 1, 2, 4, 201, 202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r).

66. *Description and Estimate of the Number of Small Entities That May Be Affected by the Further Notice of Proposed Rulemaking*. In determining the small entities affected by our *Further Notice* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *First Report and Order*.[164] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[165] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by SBA.[166] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[167] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from

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[164] *Local Competition Order*, 11 FCC Rcd at 16149-57, paras. 1341-60.

[165] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[166] 15 U.S.C. § 632.

[167] *Id.* (*citing* 13 C.F.R. § 121.201).

the definition of "small entity" and "small business concern."[168] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

67. In addition, for purposes of this IRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *First Report and Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that might be affected.[169] We further estimated that there are fewer than 1,347 small incumbent LECs that might be affected.[170] Finally, we estimated that there are fewer than 30 small entity CAPs that might qualify as small business concerns.[171]

68. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements*. It is probable that any rules issued pursuant to the *Further Notice* would not change the projected reporting, recordkeeping, or other compliance requirements already adopted in this proceeding.[172]

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[168] *See Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

[169] *Local Competition Order* at 16150, para. 1343.

[170] *Local Competition Order* at 16151, para. 1345.

[171] *Local Competition Order* at 16151-52, para. 1347.

[172] *See, e.g., Local Competition Order* at 16161-62, paras. 1374-1375.

69. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements would likely facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[173] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *First Report and Order*. This finding has not been challenged. We do not believe that any rules that may be issued pursuant to the *Further Notice* will change this finding. We seek comment on this tentative conclusion.

70. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules*. None.

3. Comment Filing Procedures

71. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before October 2, 1997, and reply comments on or before October 17, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

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[173] *Local Competition Order*, 11 FCC Rcd at 16162, para 1376.

72. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's Rules.[174] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

73. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to, and not a substitute for, the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

74. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain_t@al.eop.gov.

V. ORDERING CLAUSES

75. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201-205, 214, 251, 252, and 303(r) of the Communications

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[174] *See* 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii").

Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 214, 251, 252, and 303(r), the Third Order on Reconsideration is ADOPTED.

76. IT IS FURTHER ORDERED that changes adopted on reconsideration in section III.B. and the rule appendix will be effective 30 days after publication in the Federal Register.

77. IT IS FURTHER ORDERED, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1995), that the petitions for reconsideration filed by WorldCom, Inc. and the Local Exchange Carriers Coalition are DENIED IN PART and GRANTED IN PART to the extent indicated above.

78. IT IS FURTHER ORDERED, that the Commission SHALL SEND a copy of this Third Order on Reconsideration and Further Notice of Proposed Rulemaking, including the associated Supplemental Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

79. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, 202, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r), the FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

Final Rules

Part 51--INTERCONNECTION

1. The authority citation for part 51 continues to read as follows:

Authority: Sections 1-5, 7, 201-05, 218, l 225-27, 251-54, 271, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 218, 225-27, 251-54, 271, unless otherwise noted.

2. Paragraph (d)(1) of Section 51.319 is revised to read as follows:

§ 51.319 Specific unbundling requirements.

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(d) *Interoffice Transmission Facilities*.

(1) Interoffice transmission facilities include:

(i) Dedicated transport, defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers;

(ii) Shared transport, defined as transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC's network.

3. Section 51.515 is revised to read as follows:

§ 51.515 Application of access charges.

(d) Interstate access charges described in part 69 shall not be assessed by incumbent LECs on each element purchased by

requesting carriers providing both telephone exchange and exchange access services to such requesting carriers' end users.

August 18, 1997

SEPARATE STATEMENT OF CHAIRMAN REED HUNDT

RE: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Third Order on Reconsideration and Further Notice of Proposed Rulemaking

The Commission today reaffirms and clarifies a very important aspect of our Local Competition Order: the ability of a competitive local exchange carrier to obtain transport on a shared basis from the incumbent local exchange carrier. More fundamentally, this decision highlights the importance we place on incumbents making available to new entrants their network elements on a combined basis -- a combination sometimes referred to as the UNE platform.

In the Telecommunications Act of 1996, Congress mandated that new entrants into the formerly monopolized local exchange market have the ability to choose any or all of three entry strategies: interconnection, resale and unbundled network elements. Congress correctly foresaw that new entrants would need these flexible strategies if they are to compete successfully with the incumbents and their extraordinary economies of scale and scope.

In its decision last month, the Eighth Circuit explicitly affirmed our authority under the Act to define unbundled network elements. This is a very important aspect of our local competition policies. Where the purpose or effect of moves by an incumbent LEC to break apart currently combined elements is to create a barrier to competition, we will take action to tear down or prevent the erection of such barriers.

STATUTORY PROVISIONS INVOLVED

47 U.S.C. § 251. Interconnection

* * *

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

* * *

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to

combine such elements in order to provide such telecommunications service.

(4) Resale. The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

* * *

(d) Implementation.

(1) In general. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecomunications carrier seeking access to provide the services that it seeks to offer.

* * *

§ 252. Procedures for negotiation, arbitration, and approval of agreements.

* * *

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

* * *

(3) Wholesale prices for telecommunications services. For the purpose of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

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